

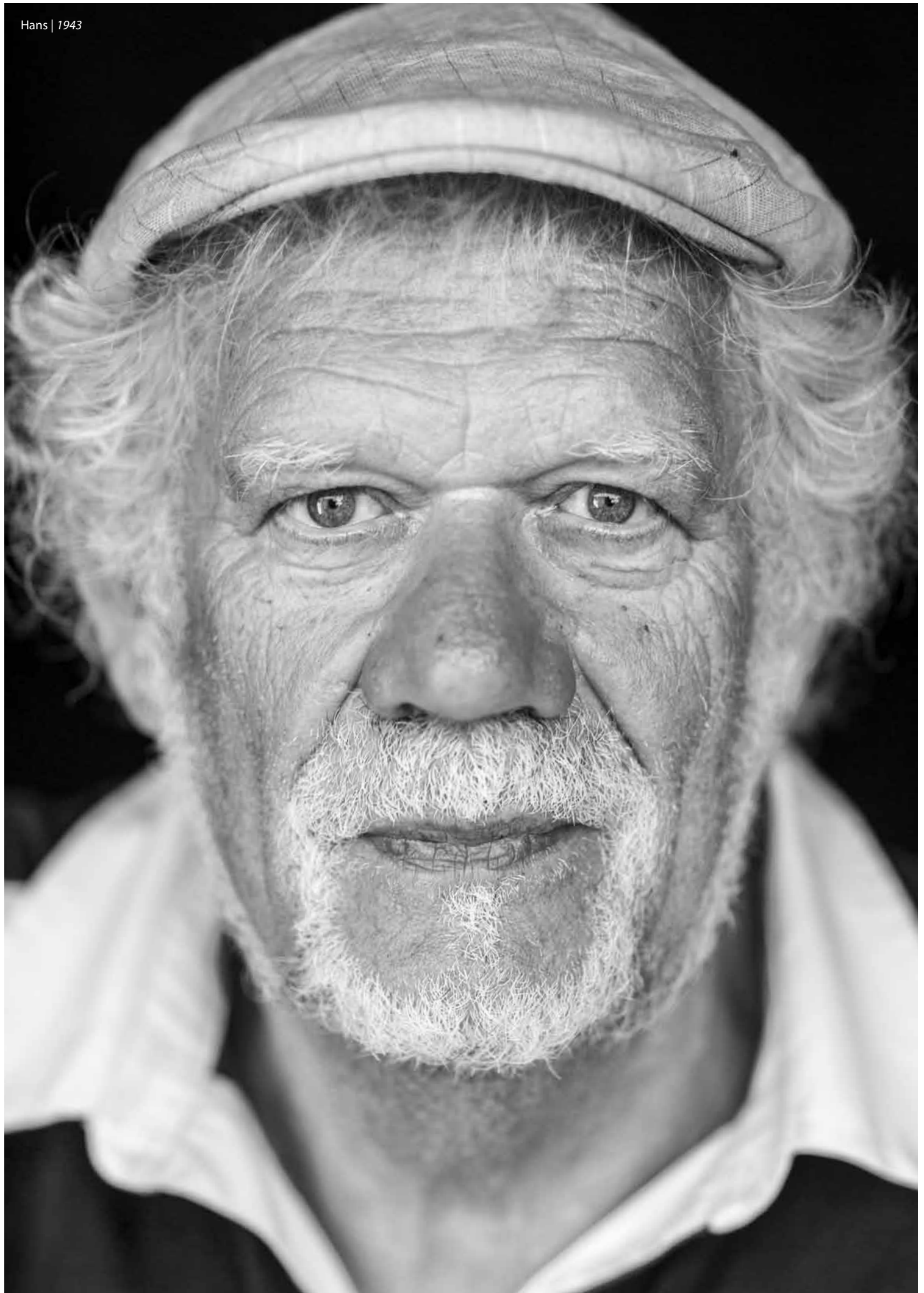
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- European Legal Policy Update
- CJEU/ECtHR Case Law Update
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# European Anti-discrimination Law Review

No. 15 - 2012



Legal Review prepared by the European Network of Legal Experts in  
the non-discrimination field (on the grounds of Racial or Ethnic Origin,  
Religion or Belief, Disability, Age and Sexual Orientation)

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The information contained in this fifteenth issue of the review reflects, as far as possible, the state of affairs on 15 June 2012.

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# Introduction

The European Network of Legal Experts in the non-discrimination field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. The Network covers all 27 EU Member States and 3 candidate countries (Croatia, the Former Yugoslav Republic of Macedonia and Turkey). Since January 2012 the EEA countries (Iceland, Liechtenstein and Norway) became part of the Network. There is one national expert per country.

The aim of the Network is to monitor the transposition of the two Anti-discrimination directives<sup>1</sup> at the national level and to provide the European Commission with independent advice and information. It also produces annual country reports, a comparative analysis on anti-discrimination law, the European Anti-discrimination Law Review and various Thematic Reports. Full information about the Network, its reports, publications and activities can be found on its website: [www.non-discrimination.net](http://www.non-discrimination.net).

This is the fifteenth issue of the *European Anti-discrimination Law Review* produced by the European Network of Legal Experts in the non-discrimination field. The Law Review provides an overview of the latest developments in European anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 June 2012). Andrea Coomber, Legal Director at INTERIGHTS contributes with an article on strategic litigation which examines cases before the European Court of Human Rights where INTERIGHTS has focused its practice. It considers the basic elements of strategic litigation, then details strategic cases describing the approaches to litigation and lessons learned in each case. The article finally considers the opportunities presented by the European Social Charter as a mechanism for progressive equality jurisprudence. Lilla Farkas, attorney registered with the Budapest Bar Association and Senior Legal Analyst at the Migration Policy Group comments and analyses the Meister case, recently delivered by the Court of Justice of the European Union. In addition, there are updates on legal policy developments at the European level and updates from the case law of the Court of Justice of the European Union, the case law of the European Court of Human Rights and decisions of the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the EU Member States, the three accession candidate countries and the three EEA countries can be found in the section on News from the Member States, Iceland, Liechtenstein, Norway, Croatia, the Former Yugoslav Republic of Macedonia and Turkey. These sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Thien Uyen Do) on the basis of the information provided by the national experts and their own research in the European sections.

In 2012 the sixth edition of the comparative analysis, *Developing anti-discrimination law in Europe - The 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared* was released and a new update is in the pipeline. In addition, a thematic report on discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression authored by Silvan Agius and Christa Tobler was published. Finally, a thematic report on housing discrimination and on the case law of Court of Justice of the European Union regarding the two anti-discrimination directives are in preparation.

In November 2012, the Network together with the European Network of Legal Experts in the field of gender equality, will organise a legal seminar titled "Equality for everyone: challenges ahead" and involving representatives of the Member States, candidate countries and EEA countries, Equality bodies and their own members. The legal seminar deals with the six grounds of discrimination protected at the EU level and involves approximately 200 participants.

Isabelle Chopin  
Piet Leunis

<sup>1</sup> Directives 2000/43/EC and 2000/78/EC.

Meet ordinary people in this Review,  
facing discrimination.

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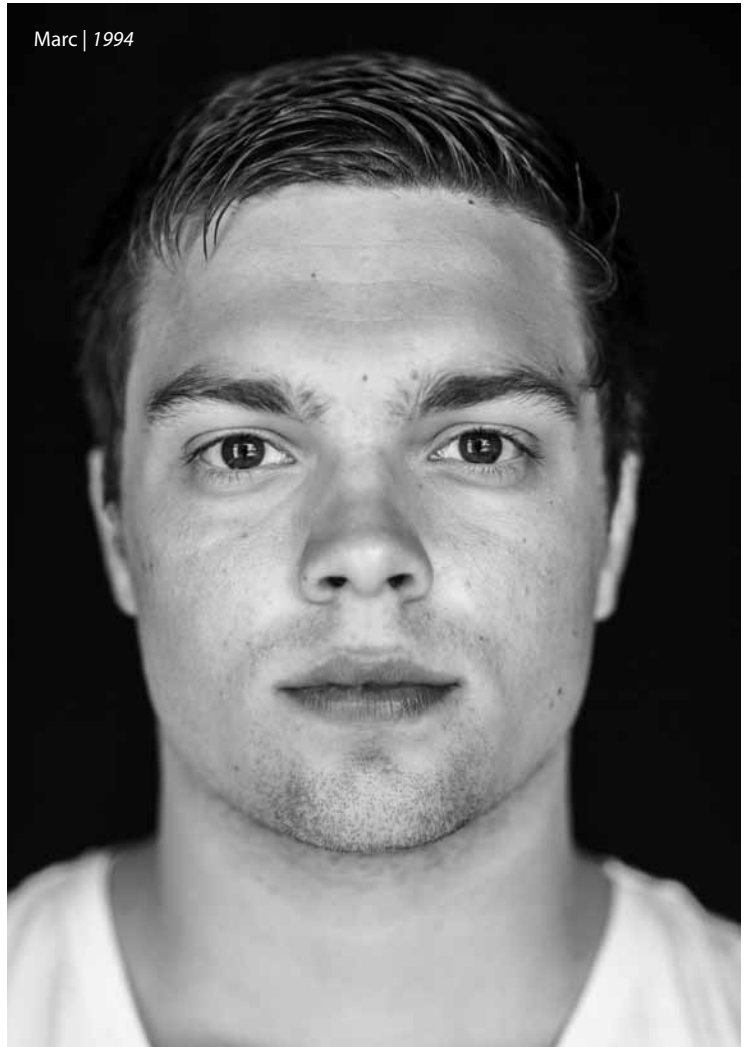
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Petra | 1992



Marc | 1994



Bart | 1969



Jenny | 1968



# Strategically litigating equality – reflections on a changing jurisprudence

**Andrea Coomber<sup>2</sup>**

In the past ten years, 'strategic litigation' has gained greater prominence as a tool for promoting equality in Europe, with numerous NGOs establishing litigation programmes to seek impact through litigation. This article focuses on strategic litigation of equality cases before the European Court of Human Rights ('the European Court' or 'Court') where INTERIGHTS has focused its practice. It considers the basic elements of strategic litigation, then details three strategic cases in which we have been involved describing the approaches to litigation and lessons learned in each case. The article finally considers the opportunities presented by the European Social Charter as a mechanism for progressive equality jurisprudence.

## **What is 'strategic litigation' and where does it come from?**

Strategic litigation (or 'impact' or 'test' litigation) is a form of public interest litigation where a case is pursued on behalf of an applicant or group of applicants, with a view to achieving a law reform goal beyond the individual case. While legal ethics dictate that the clients' interests are paramount in litigation, strategic litigation seeks an additional social or political impact beyond the remedy sought by the individual. This could be, for instance, to challenge a law or practice that is inconsistent with international human rights standards, or to seek interpretation of an existing law to redefine rights in favour of stronger protection. It is important to note that by definition strategic litigation is risky litigation. Before regional fora it can be resource intensive, take a long time, and, as these are cases at the fringes of established law, the outcomes are uncertain.<sup>3</sup> At the same time, good lawyers will frame cases in such a way as to maximise the possibilities of success, mitigating the implications of any loss.

Strategic litigation presents particular opportunities for vulnerable people for whom other channels of influence are unavailable.<sup>4</sup> It frames equality issues as problems of law rather than of minority politics, and courts often provide a more sympathetic hearing for minority rights than parliaments concerned with populist politics. It is important to note the role that litigation can play in documenting injustices – creating a record of official practices, evidencing abuse and telling victims' stories.<sup>5</sup> The many cases taken to the European Court by Kurdish people have yet to have much impact in terms of human rights protection in Turkey, but they have been critical in documenting abuses by the government and drawing attention to the experience of victims. This 'story telling' element is symbolically significant, and deeply meaningful for victims themselves, who have a sense that they have been listened to and believed, that the violations that they have suffered have not gone unnoticed.<sup>6</sup> Relatedly, strategic litigation can play an

<sup>2</sup> Andrea Coomber is Legal Director at INTERIGHTS where she formerly headed the organisation's equality litigation before the European Court of Human Rights, the African Commission on Human and Peoples' Rights and United Nations treaty bodies. The author is grateful to Vesselina Vandova and Pádraig Hughes for their comments on the draft text. All views expressed are personal.

<sup>3</sup> James A. Goldston, 'Public Interest Litigation in Central and Eastern Europe: Roots, Prospects and Challenges', *Human Rights Quarterly*, (2006) Volume 28, 492-527, at 497.

<sup>4</sup> Scott L. Cummings and Deborah L. Rhode, 'Public interest litigation: Insights from theory and practice', *Fordham Urb. L.J.*, Vol. XXXVI 2009, 603-651, at 606.

<sup>5</sup> Helen Duffy, 'Human rights litigation and the "war on terror"', *International Review of the Red Cross*, Volume 90 No. 871, September 2008 573-597, at 595.

<sup>6</sup> ERRC, INTERIGHTS & MPG, *Strategic litigation of race discrimination in Europe: from principles to practice*, 2004, England, at 37.

important role in contributing to a greater public understanding of the lives of vulnerable people and to the empowerment of that group.<sup>7</sup>

However, strategic litigation alone is a limited tool. Where judgments are successful, their implementation presents an additional set of challenges in terms of affecting change. The most successful cases are those that are brought in the context of a broader social and/or political movement, where there are parallel advocacy and lobbying efforts, engagements with the media etc. Litigation of an issue in isolation can have an impact on the case law, but is unlikely to resonate on the ground or beyond those most directly affected.

There are a number of approaches to strategic litigation. The litigation can be aimed at addressing a systematic, widespread problem on the ground (for example, trans-phobic violence) or can be aimed at addressing gaps in legal protection (for example, the absence of sexual harassment laws). The best cases are often those that manage to do both concurrently.

Strategic cases emerge in different ways. They can be conceived and constructed by human rights activists in an effort to address a specific problem – as occurred in the *DH* case,<sup>8</sup> discussed below – or they can begin as ‘normal cases’ and be argued and pursued in a strategic manner. The former approach is predicated on lengthy and expensive ground research, recruiting of appropriate potential clients and construction of arguments to achieve the agreed litigation goal. The latter arise where aggrieved individuals seek redress and their lawyers recognise that the case has the potential to make a greater impact. These cases are made strategic through careful argument, supporting evidence and often third party interventions that highlight systematic violations and inform the Court of human rights developments in other jurisdictions. This category of cases is less expensive in that they are ‘naturally occurring’, but there may be challenges with respect to the facts or domestic proceedings which have predated the engagement of the strategic lawyers. The vast majority of strategic cases before the European Court fall into the latter category.<sup>9</sup>

### **What makes a good strategic case?**

Careful case selection is critical. Organisations like the author’s organisation have criteria which we apply rigorously to ensure that we are selecting cases that stand the best chances of success and of impacting on law reform more broadly. Our case selection criteria include: whether the case reflects a systematic and widespread problem, the strength of the facts, the relevant international human rights standards, whether INTERIGHTS has appropriate expertise on the subject matter, the likelihood of success and the likelihood of implementation. In our work before the European Court, we generally engage with local lawyers who know the domestic law and procedure and who can directly support the applicant. In such cases we will act as Advisers to Counsel (an officially recognised role) and on rare occasions we act directly for applicants. Where we think we can make a meaningful contribution to the Court’s understanding of the issues in a case, we will act as a third party intervener, providing comments on relevant international and comparative human rights law.

While we always apply our case selection criteria with a degree of flexibility, for certain types of cases – for example, cases of domestic or sexual violence – it is so rare for applicants to be prepared to take their case to courts, let alone international adjudication, that we apply the criteria with a presumption in favour of taking a case and finding ways to make it strategic. This reflects one of the key challenges for strategic

<sup>7</sup> *Ibid.*

<sup>8</sup> *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007; *D.H. and Others v. the Czech Republic*, no. 57325/00, 7 February 2006.

<sup>9</sup> See for example *Opuz v Turkey* and *M.C. v Bulgaria* discussed below.



litigation – finding a good client. Much has been written about the profile of the ideal client: for example, they are sympathetic, they understand the goals of the litigation and they have strong family and community support. But the key quality of the ideal client is really their willingness to pursue the case through all the time and sometimes unpleasantness that litigation involves. By way of example, in the landmark case of *M.C. v. Bulgaria* the applicant was raped by two men shortly before her 15<sup>th</sup> birthday.<sup>10</sup> By the time she received a judgment from the European Court she was 23 years old. Such applicants prepared to persevere through years of international adjudication – during which nothing happens for years on end – are rare, and it is their rarity that presents the single biggest obstacle for the author's organisation in its litigation.

In equality cases, evidence is also often problematic. Rarely do those who are discriminated against have sufficient evidence to prove that their treatment was motivated by discrimination. For a long time this has represented a serious obstacle to equality litigation at the Court. When I began litigating equality cases at INTERIGHTS a decade ago, the European Court had not found a single instance of indirect discrimination – where a law or provision was neutral on its face, but had a disproportionate effect on a particular group – nor had it recognised that statistical evidence alone might be used to prove discrimination. The opportunity to change the Court's approach presented itself in *D.H v. Others v the Czech Republic*, discussed below.

Even where there is a positive judgment, there is often lack of implementation. For this reason NGOs like ours work with partners to try to play a stronger advocacy role post-judgment to ensure full implementation.

### **The European Court advances: three case studies**

Ten years ago, the equality jurisprudence of the European Court was rather underwhelming. Historically the construction of Article 14 (non-discrimination) – which needs to be argued in conjunction with another, substantive article of the Convention – has meant that the Court would consider the matter under the substantive article, often not finding it necessary to consider the discrimination aspect. The Court also seemed to require 'intent' to prove discrimination, had not considered that discrimination could be indirect and had not recognised certain grounds – for example sexual orientation or disability – as prohibited grounds under the Convention. A decade of strategic litigation cases has resulted in significant advances in respect of the Court's approach to equality. Below I consider a number of cases which have contributed to that change, which represent different approaches to strategic litigation and which hold lessons for future practice.

#### *The Bulgarian racial violence cases*

Those undertaking strategic litigation know that it often involves calculated losses to expose a court to arguments and fact situations which will eventually persuade it to change position. The series of Roma racial violence cases taken to the European Court in the early 2000s is illustrative of how the Court's understanding of a particular issue can evolve.

In the 1990s, racist police violence became visible to those working in Roma rights in Central and Eastern Europe. While the European Court would consider the violence as a breach of the right to life or freedom from torture and ill treatment, it would not interrogate any racist motivations for the violence, noting that the failure of the State to adequately investigate this had prevented such evidence from being available. While the Court had developed so called 'procedural obligations' with respect to right to life and ill treat-

<sup>10</sup> *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII.



ment violations, it did not adopt a similar approach to discrimination cases. The following three cases changed that.

In 2000, the Court delivered a unanimous judgment in *Velikova v. Bulgaria*.<sup>11</sup> The case concerned the death of the applicant's partner, Mr Tsonchev, while in police custody. He was Roma. In addition to Article 2 (the right to life) the applicant argued that the killing had been racially motivated, in violation of Article 14 of the Convention (non-discrimination). Evidence was presented of widespread discrimination against the Roma in Bulgaria and that Mr Tsonchev's ethnic origin was known to the police, who referred to him as a 'Gypsy'. While the Court found that the applicant's complaint under Article 14 was 'grounded on a number of serious arguments' it held that it was unable to find 'beyond a reasonable doubt' that the killing and the subsequent failure to investigate it, had been racially motivated.<sup>12</sup> It found only a violation of the right to life, and the right to an effective remedy.

Two years later, the Court delivered its judgment in *Anguelova v Bulgaria*.<sup>13</sup> Again, the case involved the death of a Roma youth, in this case the applicant's 17-year-old son in police custody. Again the applicant argued that the death and prior ill-treatment of her son was motivated by racial discrimination, in violation of Article 14. She noted that even in their official statements, the police officers had referred to her son as 'the Gypsy' and that his treatment needed to be considered in light of the systematic racism and anti-Roma hostility of law enforcement bodies in Bulgaria. Again the Court found that while the case was based on serious arguments, the 'beyond reasonable doubt' standard of proof meant that no Article 14 violation could be found.

However the Court was not, this time, unanimous. The Maltese judge, Judge Bonello, delivered a very strong and eloquent dissent. He found it disturbing that 'the Court, in over fifteen years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right to life... or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment... induced by race, colour or the place of origin of the victim... The Europe projected by the Court's case law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. The present case energises that delusion.'<sup>14</sup> Judge Bonello went on to outline a variety of methods by which, by reference international and comparative law, evidence and particularly the burden of proof could be handled in such cases to allow a fair finding of an Article 14 violation.

In 2004, the First Section of the Court delivered its judgment in *Nachova and Others v. Bulgaria*.<sup>15</sup> The case concerned the death of two Roma men of 21 years of age who, having absconded from military service, were shot dead when a military officer seeking to arrest them, a man named Major G, had opened fire in their Roma neighbourhood. One witness reported that immediately after the shooting Major G had shouted at him 'You damn Gypsies'. Again, the applicants presented considerable evidence of discrimination against and hostility towards the Roma in Bulgaria, arguing that the killings amounted to an Article 14 violation. On this occasion, the Court amended its approach.

The Court considered that it did not have sufficient evidence of racist motivation because the Bulgarian authorities had failed to investigate racist motivations for the violence, despite having good reason to believe that such motivations might exist. On this basis the Court established, and found, a violation of a procedural limb of Article 14. However the Court went further, and decided to examine the merits of

<sup>11</sup> *Velikova v. Bulgaria*, no. 41488/98, ECHR 2000-VI.

<sup>12</sup> *Ibid.*, at §94.

<sup>13</sup> *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002-IV.

<sup>14</sup> *Ibid.*, Dissent of Judge Bonello, §2.

<sup>15</sup> *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, 26 February 2004.

a substantive violation – that the men were killed because they were Roma – on the basis of Article 14. To do this, it shifted the burden of proof to the government to prove that the deaths were not the result of racism, and given its failure to do so, found a substantive violation of Article 14. Referencing *Velikova* and *Anguelova*, the Court noted that it considered it ‘highly relevant that this is not the first case against Bulgaria in which it has found that law enforcement officers had subjected Roma to violence resulting in death.’<sup>16</sup>

The Bulgarian government requested referral of the decision to the Grand Chamber of the Court. Identifying what we considered the key challenges for the Court in approaching the case, three organisations with interests in the case coordinated our *amicus* requests so that there were three complementary third party interventions: one from the European Roma Rights Centre (on Roma discrimination in the region); one from INTERIGHTS (on the burden of proof issue) and one from the Open Society Justice Initiative (on the procedural obligations). While the Grand Chamber maintained and found a violation on the basis of the ‘procedural obligation’ under Article 14, the majority returned a finding of no substantive violation in light of insufficiency of evidence of discrimination.<sup>17</sup> Six judges provided a robust dissent and held there was sufficient evidence of a substantive violation of Article 14.

The *Nachova* judgment has resonated through the Article 14 case law of the Court. It established a procedural obligation whereby states are required to investigate discriminatory motivations of killings where there is a reasonable suspicion of such motivation. It also opened the way, where there is sufficient evidence, for substantive violations of Article 14 in conjunction with Article 2. The principles elaborated in *Nachova* have now been applied to other grounds of discrimination, in respect of private violence and in respect of violence that has not resulted in death.<sup>18</sup> In terms of strategy, the Bulgarian racist violence cases demonstrate that moving courts from established positions in law requires patience and persistence. They demonstrate the importance of providing context for violations and for coordinating efforts with interveners to maximise the potential of international and comparative material.

#### *D.H. and Others v the Czech Republic*

The litigation strategy in the landmark US Supreme Court case of *Brown v. the Board of Education*<sup>19</sup> was explicitly the inspiration for *D.H. and Others v. the Czech Republic*. To this day, *D.H.* represents the most systemic challenge to an equality problem in Europe, with the biggest case budget and highest profile.

In 1998, the European Roma Rights Center (ERRC) decided to invest substantial resources on a test case addressing segregated education in Central and Eastern Europe. Across the region, Roma children were (and still are) schooled in separate classes or sometimes separate schools, often ‘special schools’ for children with intellectual disabilities. Following years of research and consultation with Roma communities, the ERRC identified special schools in the Czech city of Ostrava as the target for the litigation, interviewing hundreds of families and ultimately selecting 18 Roma children to be applicants in a case to the European Court challenging segregation in education. All were children whose initial test results and subsequent academic performance suggested that they did not belong in a special school, and who seemed to genuinely want to end segregation more broadly.<sup>20</sup>

<sup>16</sup> *Ibid.*, §176.

<sup>17</sup> *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII.

<sup>18</sup> See for example, *Milanović v. Serbia*, no 44614/07, 14 December 2010 which concerned ill-treatment based on religious discrimination.

<sup>19</sup> *Brown v. The Board of Education of Topeka* (1954) 347 US 483 which challenged racial segregation in education in the United States of America.

<sup>20</sup> James A. Goldston, ‘Ending racial segregation in schools: the promise of *DH*’, *Roma Rights Journal*, Number 1, 2008, 1-5 at 2.



The ERRC research demonstrated multiple layers of discrimination against Roma children but primarily focused on indirect discrimination, hitherto unrecognised by the Court. The children were allocated to special schools on the basis of tests that were on their face neutral, but in reality were strongly biased towards children well versed in Czech language and culture, and against Roma children. Roma children were 27 times more likely as non-Roma children to be sent to a special school.

The case was decided first by a Chamber and then by the Grand Chamber, with INTERIGHTS and Human Rights Watch intervening jointly in both proceedings. By reference to international and comparative equality law, our interventions guided the Court towards recognising that indirect discrimination as a violation of Article 14 of the Convention, elaborating how indirect discrimination could be proved generally and recognising that statistical evidence specifically – where reliable and significant – could be used to prove discrimination.

In February 2006, the Chamber of the Court issued a disappointing judgment.<sup>21</sup> While the majority noted that the application raised a ‘number of serious arguments’<sup>22</sup> and recognised that indirect discrimination might possibly give rise to a violation of the Convention (though it did not use the term),<sup>23</sup> they did not find sufficient evidence to disclose discrimination. In respect of statistics, while stating that it found the statistics on the education of Roma in special schools ‘worrying’, the Court reiterated its position that ‘statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory’.<sup>24</sup>

The matter was referred to the Grand Chamber of the Court, which in November 2007 delivered a very different judgment. Recognising and for the first time using the term ‘indirect discrimination’, the Court’s judgment turned on its new approach to the question of proof. The Court found that where the applicant raises a *prima facie* case of discrimination, the burden shifts to the government to provide a discrimination-neutral explanation for the treatment or effect. Significantly, the Court held that where a critical assessment reveals statistics to be reliable and significant, they alone can establish the *prima facie* case resulting in a shift of the burden of proof. In many respects the *D.H.* Grand Chamber judgment brought the European Court jurisprudence in line with European Union standards such as those in the EU Race Equality Directive.

The *D.H.* litigation was an impressive example of strategic litigation. Without careful case strategising, applicant selection, *amicus* strategy and use of international and comparative law, the European Court is unlikely to have had the opportunity to so clearly articulate its position on segregated education. While the individual measures – in this case compensation of €4,000 each – were swiftly granted by the Czech Government to the applicants, the process of desegregating schools was more problematic. The fact of the litigation itself forced changes in Czech educational law, with the Czech parliament adopting legislation abolishing special schools in name and modifying the system of special education before either judgment was delivered. However on the ground, the situation of Roma children remains unchanged.

It is interesting to note that the educational needs of children with disabilities in the special schools were not considered in the *D.H.* case strategy – the ERRC is an organisation mandated to promote Roma rights, and at the time of the application in 2000 the rights of people with disabilities were far from the international human rights agenda. Many disability activists and lawyers, the author included, were of the view that the case seemed to implicitly accept the acceptability of segregated (and poor quality) education for children with disabilities and was therefore a missed opportunity to shine a light on the unacceptability of special schools for children of disabilities also. While disability organisations were not included in the

<sup>21</sup> *D.H. and Others v. the Czech Republic*, no. 57325/00, 7 February 2006.

<sup>22</sup> *Ibid.*, at §45.

<sup>23</sup> *Ibid.*, at §46.

<sup>24</sup> *Ibid.*

initial strategy, a decade on understanding of disability among civil society has strengthened and disability organisations have become partners in the implementation stage of the decision, with a recognition that if the special schools are closed for children with disabilities, Roma children will not be schooled in them either. This is very much in line with the UNCRPD's commitment to inclusive education being the default position for children with disabilities. Such collaborations across grounds of discrimination are deeply significant symbolically and make sense in terms of coordinating promotion of minorities in line with principles of the indivisibility of human rights.

Perhaps the most important aspect of *D.H.* is that the experience of Roma children in Central Europe was 'heard', just as the victims of education racial segregation in the USA were 'heard' by the Supreme Court in *Brown v. The Board of Education of Topeka*. While implementation remains a key goal for litigation, the significance of the factual unearthing of violations through litigation and the case law that emerges from these cases is crucial regardless. *D.H.* is one of the Court's most important equality cases, and the principles it elaborated have been picked up in subsequent cases on women's human rights and religious minorities, for example.

#### *Opuz v Turkey*

While *D.H.* was the product of strategy and planning, *Opuz v Turkey*<sup>25</sup> arose organically – it was born of an applicant's call for justice in response to a personal tragedy. It is an example of the more common, in many ways easier type of strategic litigation, where a 'naturally occurring' case is argued and supported in such a way as to become strategically significant. Unlike *Nachova*, there was no particular trend in the Court's case law which led to the positive judgment; to the contrary the Court had never demonstrated that its approach to non-discrimination could extend to cover gender-based violence.

Nahide Opuz submitted an application to the European Court following the murder of her mother by the applicant's own husband. This killing followed many years of domestic violence, sometimes life threatening, which was often reported to the police. Sometimes the applicant withdrew the complaints of violence due to fear of greater reprisals from her husband, on other occasions the complaints were maintained but little was done by the police to protect the applicant and her family. On one occasion the applicant's mother was hit by a car, receiving life threatening injuries and hospitalised. The perpetrator was convicted of attempted murder and paid a fine. The violence was repeatedly minimised by the police and prosecutors as being a family affair, of no public consequence.

Over time, the violence escalated and the applicant and her mother complained to the police of greater violence and death threats. The police took no action. Ultimately, the applicant's mother was in a removal van moving her belongings to a safer place when the vehicle was stopped by a taxi from which the applicant's husband emerged and shot her mother dead. He claimed that she had been interfering in his marriage and that he killed her 'for the sake of his honour and children'.<sup>26</sup> He was convicted of murder. By the time the case was heard at the European Court – six years later – he had been released and was again threatening the applicant.

The applicant submitted her case to the European Court of Human Rights within months of her mother's death. She claimed violations of her mother's right to life and her own right to freedom from torture and discrimination, emphasising the subjugated position of women in Turkish society.

<sup>25</sup> *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

<sup>26</sup> *Ibid.*, at § 54.



While other interesting issues are raised, for the purpose of this article I will focus on the discrimination aspect. The applicant argued that the failure of the Turkish authorities to protect her and her mother from the violence amounted to a violation of Article 14 (in conjunction with Articles 2 and 3).

INTERIGHTS has long worked on gender-based violence before the Court – for example, having intervened in *M.C. v. Bulgaria* and advising counsel in the domestic violence case of *Bevacqua and S. v. Bulgaria* – so when we observed *Opuz* on the list of communicated cases from the Court, we were looking for ways in which the case could strengthen the case law. The applicants had argued the Article 14 violation with reference to substantial evidence of high rates of domestic violence in Diyarbakir where the applicant lived and noting that police responses were generally geared towards mediation – trying to get the victims to return home and drop their complaint – and non-interference by the authorities. We were given permission by the Court to intervene on states' obligations with respect to domestic violence and on the characterisation of domestic violence as discrimination. Our intervention highlighted the growing body of international law – from the Committee on the Elimination of All Forms of Discrimination against Women, from the Inter-American Court and from domestic jurisdictions – which has recognised gender-based violence as a form of discrimination.

As noted above, where it has found violations of substantive articles of the Convention the Court's long standing – though slowly changing – approach has been to find it unnecessary to consider Article 14. At the time of our submission, in violence against women cases the Court had not engaged at all with non-discrimination arguments. Accordingly, at the time of our intervention, and at the hearing a year later, there was no basis in the Court's own case law for our discrimination arguments and we were relying exclusively on international and comparative material. As a result, our expectations of the Court were low and at the hearing we effectively addressed our presentation to one particular judge whom we imagined would be sympathetic. Mindful of the *Velikova-Anguelova-Nachova* experience, our strategy was to secure at least one dissenting opinion to begin moving the Court toward gender-based violence as an Article 14 violation. On this occasion, our lack of confidence was misplaced.

Unanimously, the Court found not only violations of Article 2 and 3, but for the first time they extended the protection of Article 14 to victims of domestic violence. Relying on its finding in *D.H.* the Court held that a *prima facie* case of discrimination had been established by reference to the extent of violence against women in the region of Turkey. It relied heavily on international and comparative law before finding a violation of Article 14 in light of the 'general and discriminatory judicial passivity... [which] created a climate that was conducive to domestic violence.'<sup>27</sup> Nahide Opuz was awarded compensation for pain and suffering in the order of €30,000 and thanks to the Court's specific instructions she now has a constant security detail protecting her from her husband.

*Opuz* is significant for the Court's discrimination case law and for international jurisprudence on gender equality. The Court has acknowledged the extent to which gender-based violence is an issue of inequality and how it impedes the enjoyment of numerous other rights. The judgment has been widely referred to by other courts – most notably the Inter-American Court of Human Rights in the *Jessica Lenahan (Gonzales)* case<sup>28</sup> – and was referenced in the drafting of the new Council of Europe Convention on preventing and combating violence against women and domestic violence.<sup>29</sup> Referring to the new Convention, Turkey has now adopted a new domestic violence law which, while inadequate in part, increases protection for women like Nahide Opuz.

<sup>27</sup> *Ibid.*, at §192.

<sup>28</sup> *Jessica Lenahan (Gonzales) et al v. United States*, Report No. 80/11, Case 12.626, 21 July 2011.

<sup>29</sup> See the Explanatory Report to the Convention, §§49, 58 and 163.

In *Opuz*, what was a very tragic, but regrettably common domestic killing was made into a vehicle for significant change in the law domestically and internationally. I believe *Opuz* was successful on Article 14 because the applicant put discrimination at the heart of the application from the very beginning – the context of violence against women in Turkey was emphasised and evidenced repeatedly – and because our intervention put pressure on the Court to advance its case law on gender-based violence, lest it lagged behind other international and regional bodies.

### **Another option – the collective complaints procedure of the European Social Charter**

As noted above, litigating human rights cases is made difficult by finding appropriate applicants but also by strict admissibility criteria before the Court, for example the need to establish victim status, the need to exhaust domestic remedies and to submit within six months. While not individual litigation in the purest sense, the Council of Europe's Social Charter provides a collective complaints' mechanism which presents attractive opportunities to promote economic and social rights without presenting these admissibility challenges. Though not all Member States recognise the collective complaints mechanism, those that do allow certain NGOs and trade unions to make complaints to the Committee on the basis of the 1961 Social Charter or the Revised Social Charter. Taking a collective complaint involves no applicants, no exhaustion of domestic remedies, no deadlines, and yet could yield findings of violations, implementation of which is overseen by the Committee of Ministers in much the same way as judgments of the European Court.

A collective complaint either requires demonstration that a law on its face is inconsistent with the Charter or the provision of evidence that a law is inadequately implemented leading to violations of Charter rights. In the latter case, substantial ground research and evidence may be required, as was the case in the two cases we have taken to the mechanism to date.<sup>30</sup> Unlike the European Court, which can take many years to come to judgment, at present the Social Charter Committee issues a final merits decision within around 18 months, providing a more speedy way to secure a ruling capable of being used in lobbying or referenced in individual litigation.

To date the Social Charter Committee has proved itself very strong on non-discrimination and equality, incorporating an equality analysis into a majority of its decisions. The decision in the case of *Autism Europe v. France*,<sup>31</sup> for example, provides an elegant elaboration not only of the right to education, but of the meaning of equality for persons with disabilities in respect of education. The decision in *Interights v. Croatia* – a case primarily concerning the inadequacies of abstinence-based sex education in Croatia – provided strong language prohibiting homophobic content in school text books and has resulted in amendment to the offending texts.

The collective complaints mechanism provides exciting litigation opportunities for those groups for whom access to justice is vexed or where litigants are reluctant to come forward but face systemic discrimination. In the author's mind, it has been underutilised by those adopting a strategic litigation approach.

### **Conclusion**

While strategic litigation has resulted in many meaningful advances in the Court's case law over the past decade – the recognition of indirect discrimination, the establishment of procedural obligations under Article 14 and the extension of protection to new groups – the advances have not been uniform. In

<sup>30</sup> *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, No. 45/2007, decision of 9 April 2009; *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, No. 49/2008, decision of 25 January 2010.

<sup>31</sup> *Autisme-Europe v. France*, No. 13/2002, decision of 7 November 2003.



respect of disability, for example, the Court has found itself stuck in a largely medical model of disability, not adapting to the innovations in the UNCRPD with respect to equality nor demonstrating much of an appreciation for the way in which people with disabilities experience violations of their rights. When cases fail, we review our strategies and discuss new approaches with partners, and are committed to continuing to make the equality arguments that we believe will one day form part of the Court's case law.

As stated at the outset, strategic litigation is an imperfect tool, but it has a valuable contribution to make. The experience of European Court equality litigation over the past decade has shown that the Court does move in response to strategic argument, it is sensitive to being out of touch with emerging international trends and it can provide a lever to help shift political and public opinion. The last ten years have taught me the need for patience and commitment to strategy, tenacity in the face of adverse judgments and confidence that the Court seeks to lead human rights law internationally, and will therefore, ultimately, increase protection for vulnerable people.



# Getting it right the wrong way?

## The consequences of a summary judgment: the *Meister* case

Lilla Farkas<sup>32</sup>

This article examines the judgment of the Court of Justice of the European Union (CJEU) delivered in the *Galina Meister* case (C-415/10) on 19 April 2012. It argues that while the CJEU's finding appears to be in line with considerations pertaining to the burden of proof applicable in the anti-discrimination field, its assessment of procedural rights and obligations runs counter to the Court's function of ensuring the uniform application of European Union law. The judgment cannot be comprehended without the reasons provided by the Advocate General (AG) in his opinion of 12 January 2012. By failing to (re)-assess and clarify this opinion, the apparently summary judgment not only fails to provide clear guidance on procedural concerns – a need also expressed earlier by the referring Belgian court in *Feryn*<sup>33</sup> – but also falls short of analysing all the procedural issues raised by the referring German Federal Labour Court. In the long run and in the wider social context, such hastiness may backfire on the anti-discrimination agenda and on individuals seeking protection from discrimination in courts of law.

In summary, the judgment states that relevant EU law 'must be interpreted as *not* entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process. Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the [national] court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.'

Following a short summary of the facts, this article analyses the judgment in conjunction with the AG's Opinion and contrasts the application of the burden of proof provisions to the grounds of sex, race and age as surmised from these documents with a model based on the Non-discrimination Directives and jurisprudence from the United Kingdom. The article focuses on the following key issues: (i) establishing a comparator, (ii) using a hypothetical comparator, (iii) access to information (personal data), (iv) rules of disclosure, (v) consequences of the judgment for the procedure of Equality Bodies, and (vi) consequences in the wider social context. It does not deal with amendments to the burden of proof provision pertaining to sex discrimination, as they appear irrelevant in the present context.

### Facts of the case

As recalled by the judgment, Ms Galina Meister is a Russian national, who was born on 7 September 1961. She holds a Russian degree in systems engineering, which has been recognised in Germany as the equivalent of a German degree awarded by a university of applied science.

On 5 October 2006, she responded to a job advertisement placed in a newspaper by Speech Design Carrier Systems GmbH. In a letter of 11 October 2006, the latter rejected Ms Meister's application, without

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<sup>33</sup> Case C-54/07, where questions 1-5 dealt with evidence and the burden of proof.

inviting her for a job interview. Soon afterwards, the company published a second job advertisement with the same content – this time on the internet. On 19 October 2006, Ms Meister reapplied but her application was again rejected. She was not invited for an interview and she was not told on what ground her application was unsuccessful.

No evidence available in the case file suggests that Ms Meister's level of expertise did not correspond to that sought in the recruitment process.

Ms Meister brought an action against Speech Design on the basis of discrimination in her access to employment based on sex, age and ethnic origin. Secondly, in order to obtain the necessary information, Ms Meister requested the trial court to order the company to produce the file of the person who was engaged for the job. Neither the AG's opinion nor the judgment lays out German domestic rules of disclosure. Nor do they summarise data protection rules relating to personal data on sex, age and ethnic origin.

Although the judgment omits this detail, the AG's Opinion recalls that during the domestic trial, the company's representative 'was unable to explain clearly the chronology of the recruitment process'.<sup>34</sup> Given that the company refused to disclose the requested file and that its representative's testimony was unclear, Ms Meister could not produce evidence of the following: 1. that a person was called to an interview and/or recruited by the company and 2. that this person lacked the protected grounds/characteristics<sup>35</sup> that she possessed. This information was held by Speech Design and was not even provided by its representative during the trial.

### **The model application of the burden of proof provision**

Bearing in mind the refusal to interview/recruit, under the Non-discrimination Directives, it appears that a court needs to clarify the following issues with regard to the above facts. Did Ms Meister suffer discrimination? Did she suffer discrimination on one or two counts – the first on 11 October 2006 and the second presumably at the end of October 2006? What form of discrimination did she suffer and on what ground?

It is not clear from either the AG's Opinion or the judgment whether Ms Meister claimed to be a victim of direct discrimination on the grounds of sex, age and ethnic origin, or of direct discrimination on the grounds of sex and age coupled with indirect discrimination on the ground of ethnic origin. Furthermore, it is not clear whether she alleged to be a victim of direct discrimination on multiple grounds, i.e. any of the grounds combined.

The domestic provisions cited in the referral shed some light on the questions above as they include a definition of direct discrimination.<sup>36</sup> It is also to be noted that under Paragraph 7(1) of the General Equal Treatment Law (*Allgemeines Gleichbehandlungsgesetz*, AGG) a presumption of discrimination can also be established if a respondent 'merely assumes' that one of the grounds protected under German law exists.

Clearly, a sound judgment cannot be rendered without identifying the form of discrimination suffered by Ms Meister. Given that the concepts of direct and indirect discrimination differ – including justification for these forms of discrimination, which is further dependent on the protected characteristic of the individual bringing an action – the burden of proof applies to these forms of discrimination in rather different ways. Thus, the burden of proof provisions of the Anti-discrimination Directives cannot be assessed in and of

<sup>34</sup> Opinion of Mr Advocate General Mengozzi, C-415/10, para. 36.

<sup>35</sup> Taking into account the terminological differences across Member States, to denote protected grounds or characteristics this article will use the latter term.

<sup>36</sup> Galina Meister judgment, C-415/10, para. 21.

themselves. However, neither the AG's Opinion nor the judgment discuss the form of discrimination in relation to which the burden of proof provisions apply in the present case.

The judgment recalls the national definition of direct discrimination – clearly because the referral ought to have been based on this provision. This definition – given under Paragraph 3(1) AGG – is identical to that in the Non-discrimination Directives:

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated *in a comparable situation* [emphasis added], on [*inter alia* sex, age and ethnic origin].

Pursuant to this definition, in the case of direct discrimination, an individual bringing an action needs to establish that she suffered less favourable treatment (disadvantage) and that she has a protected characteristic (such as sex, age and ethnic origin in the present case). However, from the definition one can surmise that in order to establish a presumption of direct discrimination, a comparator also needs to be identified. As a general rule, the treatment meted out to the comparator clarifies whether or not the *reason* for a claimant's less favourable treatment was her protected characteristic. The comparator can be real or *hypothetical* given the wording of the definition ('would be'). A presumption of direct discrimination is established if the comparator – who did not have the protected characteristics(s) invoked – did not suffer less favourable treatment (disadvantage).

Once the above elements of direct discrimination are established in a manner from which it may be presumed that discrimination has taken place, it falls to the respondent to prove that there has been no breach of the principle of equal treatment.<sup>37</sup> A presumption of discrimination means that on a balance of probabilities it appears more likely that discrimination has taken place. Once such a presumption is established, the onus shifts to the respondent to prove that his action was justified under the relevant Non-discrimination Directive.<sup>38</sup>

Establishing a comparator in cases of direct discrimination is essential, as a person having a protected characteristic – as a general rule – cannot successfully establish less favourable treatment or a particular disadvantage without comparing her treatment or disadvantage to a person who does not have that protected characteristic.<sup>39</sup> In general, therefore, if a comparator cannot be established, neither less favourable treatment nor a protected characteristic can be established in a manner that would satisfy the threshold included in the burden of proof provisions: a presumption of discrimination, i.e. that discrimination would appear more likely than not to have occurred.

<sup>37</sup> Article 8 RED (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive)), Article 9(1) FED (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Employment Directive)), and Article 17(1) Recast Gender Directive (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)).

<sup>38</sup> For a summary of ground specific justifications, see *How to bring a discrimination claim*, pp. 34-35.

<sup>39</sup> There are situations where establishing a comparator does not appear to be possible or necessary. For instance, this may be the case if the less favourable treatment is manifested in conduct that constitutes an otherwise unprecedented or gross violation of human dignity. Furthermore, in various Member States the focus of analysis has been on the arbitrary nature of different treatment, rather than on actual comparisons. Indeed, it is suggested by Interights that "if it is not possible to find a comparator, a complainant may be able to compare the treatment suffered against a substantive ideal of human dignity or standard of treatment that is widely acknowledged". Interights also suggests that under the Non-Discrimination Directives such comparison is possible. See, *Non-Discrimination in International Law: A Handbook for Practitioners*, Interights, 2011, pp. 105-106.

In the United Kingdom, for instance, in *Igen Ltd & Ors v Wong* the Court of Appeal set out detailed guidelines on the application of the burden of proof in cases dealing with various grounds of discrimination.<sup>40</sup> There, 'it is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal can conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful'.<sup>41</sup> The Court of Appeal also laid down that 'Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. *In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice*' (emphasis added). Certainly, the questionnaire procedure – described below – preceding litigation and available under domestic law in a few Member States (including the UK) accelerates access to information.

As McColgan explains, the 'Court of Appeal also confirmed that it was possible for employment tribunals to find that *unreasonable behaviour by an employer that appeared to be linked to one of the grounds covered by the Directives could by itself result in the burden shifting to the employer* to show an adequate non-discriminatory explanation for the behaviour in question' (emphasis added).<sup>42</sup>

### **Liability for failing to establish a real comparator**

Ms Meister produced evidence of less favourable treatment (disadvantage). She proved that although she had the necessary qualifications, she was not called for interviews or recruited to a job that was advertised twice by Speech Design. She also produced evidence of her sex, age and ethnic origin. Her personal data – the Slavic-sounding female surname, her citizenship, her place and date of birth – proved her sex, age and ethnic origin in a way that a reasonable person ought to have assumed that she was a woman of ethnic origin other than German, aged 46 at the material time. Given that domestic law provided protection from discrimination based on an assumed ground, her protected characteristics appear to have been sufficiently established.<sup>43</sup> However, the evidence she produced appeared insufficient because she could not identify a comparator. Had she succeeded in identifying her comparator, she could have established an indication, a presumption that her protected characteristic(s) were the reason for less favourable treatment.

In order to ascertain whether or not Ms Meister complied with her obligation under the relevant burden of proof provisions, the question of whether the failure to identify a comparator was attributable to her ought to have been answered. Undisputedly, she did everything in her power to discover facts that would have enabled her to identify her comparator. She requested the file of the person finally recruited and heard Speech Design's representative on the recruitment process.

Consequently, the failure to identify a comparator and comply with her obligations under the burden of proof provision is attributable to Speech Design. In this case, there are three options left for domestic courts: 1. by drawing inferences from the available facts and circumstances of the case, presume that discrimination has taken place and shift the burden of proof to the company; 2. in lieu of a real comparator, make a decision on the basis of a hypothetical comparator; or 3. dismiss the claim.

<sup>40</sup> Information on jurisprudence in the UK is based on Aileen McColgan's *Country Report on Measures to Combat Discrimination*, 2010, pp. 29-31, available at [http://www.non-discrimination.net/content/media/2010-UK-Country%20Report%20LN\\_FINAL\\_0.pdf](http://www.non-discrimination.net/content/media/2010-UK-Country%20Report%20LN_FINAL_0.pdf).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, 2010, p. 30.

<sup>43</sup> *Galina Mesiter* judgment, para. 21.



While the trial and appeal courts in Germany dismissed the claim, the CJEU, in essence, chose the first option. The judgment recalls that it is for the referring court to ensure that the company's refusal to grant any access to information to Ms Meister 'is not liable to compromise the achievement of the objective pursued by' the EU Anti-discrimination Directives.<sup>44</sup> As demonstrated above, the company refused to grant access to information pertaining to Ms Meister's comparator. In other respects, Ms Meister furnished evidence relating to less favourable treatment and her protected characteristics during the trial phase.

It is argued here that the CJEU missed the vital opportunity presented by the *Galina Meister* case to provide guidance on the uniform application of the burden of proof provisions. Regrettably, it earlier sidestepped a similar chance in *Feryn*.

Given the pivotal role played by the reversed burden of proof in ensuring effective judicial protection, it would appear imperative that, following the expansion of the protected grounds (to race and ethnic origin, age, disability, sexual orientation and religion and belief), the CJEU reaffirms its commitment to the enhanced judicial protection that the Court itself created in equal pay cases based on gender.<sup>45</sup> The referrals in *Galina Meister* and *Feryn* indicate that, now as ever, there is great need for clear guidance on the application of the burden of proof provisions by domestic courts – particularly when the ground of race and ethnicity is implicated. Guidance ought to be provided on the full spectrum of the burden of proof provisions instead of being diminished to certain aspects – such as access to information.

The referring domestic court would perhaps have benefited more from an analysis of the evidentiary difficulties as laid out above, as well as from a clear statement on the necessity of and guidance on drawing inferences from circumstantial evidence in cases similar to the one at issue.<sup>46</sup>

### **Hypothetical comparator**

The definition of direct discrimination allows for the use of hypothetical comparators. Hypothetical comparators are used if a real life comparator cannot be identified to facilitate the establishment of facts which may give rise to a presumption of discrimination. Constructing a hypothetical comparator is not an easy task, but it must under all circumstances lead to a comparator that factors out the protected ground(s) invoked.<sup>47</sup> Alternatively, a hypothetical comparator can be construed on the basis of an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.

In *Galina Meister*, it was established that the company had not recruited a person on either occasion, so a hypothetical comparator could have been construed on the basis of the company's previous recruitment practices regarding male, young and/or majority ethnic applicants. Under the ideal minimum standard test, a hypothetical comparator could have been construed on the basis of the conduct of a reason-

<sup>44</sup> *Galina Meister* judgment para. 42.

<sup>45</sup> According to the CJEU, victims 'could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory' (ECJ Case C-109/88 *Danfoss*). This principle, first formulated in case law, was then adopted in European law and serves as the basis for proving discrimination under the Non-discrimination Directives.

<sup>46</sup> For a summary of principles and case law on drawing inferences, see *Non-discrimination in International Law: A Handbook for Practitioners*: an international handbook published by Interights, pp. 112-113, available at <http://www.interights.org/handbook/index.htm>.

<sup>47</sup> On the details of constructing hypothetical comparators, see *Direct Discrimination: A Practical guide to Comparators*, Paul Epstein QC and Dee Masters, Cloisters Chamber, 16 June 2011, available at <http://www.cloisters.com/seminar-downloads/comparators-in-direct-discrimination-cases-9-9-11-final.pdf>.





able employer who receives an application from a person who has the qualifications required in the job advertisement.

### **Access to (personal) information**

When facing the referral in the *Galina Meister* case, the first question a practising lawyer asks is: what are the rules of disclosure in Germany? Can a plaintiff request a respondent to disclose whether a person was indeed hired for the job? Can a plaintiff recover this information during a trial from the respondent's representative? If this question is answered in the affirmative, then in order to understand why difficulties arose in relation to information on that person's sex, age and/or ethnic origin, data protection rules pertaining to these protected grounds need also to be clarified.

Strikingly, it is not known from the referral, the AG's Opinion or the judgment whether or not Speech Design recruited anyone for the job. Such information could have certainly been provided in an anonymous manner. This is therefore information that the respondent could have furnished in writing or through the witness testimony of its representative without breaching data protection rules. Furthermore, if the company had recruited a person for the job, his or her sex, age, country of origin and/or citizenship (the latter two being proxy data for ethnic origin) could have also been provided in an anonymous fashion, i.e. without breaching rules on sensitive personal data.

Data on ethnic origin are considered as sensitive data in the vast majority of Member States, the handling of which is not prohibited once safeguards are complied with – such as express (written) permission of the data subject.<sup>48</sup> It is, however, argued here that even without providing data on ethnic origin, proxy data (i.e. country of origin or citizenship) could have been provided, which would have in turn established the ethnic origin of the person recruited as assumed by the employer. Certainly, providing anonymous personal data would not have breached the rights of the person finally recruited. Thus, the employer would not have been liable viz. a third person recruited because it complied with Galina Meister's request for disclosure – a point raised but not resolved in the AG's Opinion.<sup>49</sup>

A practising lawyer is therefore left to wonder why the relevant domestic provisions (i.e. on disclosure and the processing of data pertaining to sex, age, citizenship and country of origin) were not cited and why the most basic issues were not clarified in the AG's Opinion and the judgment. This failure is all the more perplexing because the referring Federal Labour Court presented *Galina Meister* as essentially turning on access to personal information held by an employer.

In the light of the aforesaid, it is argued here that both the AG's Opinion and the judgment are somewhat illogical, and their consideration of the questions referred is on the one hand too broad and general, while on the other hand being incomplete. Both the AG's Opinion and the judgment were framed by the referral, which placed the plaintiff's access to information in the context of equal treatment. More precisely, the issue at stake was access to personal information held by an employer, in the context of equal treatment. Clearly, the questions referred concerned European Union law beyond the field of non-discrimination, namely in the field of the protection of personal data. Speech Design is a processor of personal data of its employees, and as such, is bound by domestic, as well as European Union law – namely by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>48</sup> Timo Makkonen, *Measuring Discrimination – Data Collection and EU Equality Law*, November 2006, p. 85, available at [http://www.migpolgroup.org/publications\\_detail.php?id=162](http://www.migpolgroup.org/publications_detail.php?id=162).

<sup>49</sup> *Galina Meister*, AG's Opinion, para. 23.

Instead of examining – in order to ascertain compliance with the relevant EU directives – domestic rules of disclosure and data protection, and clarifying whether under domestic law the identification of a real but anonymous comparator, as well as his personal data corresponding to the protected grounds invoked by Galina Meister, appeared in any way impermissible, the AG's Opinion set out to examine *in general* to what extent access to information is ensured by the Anti-discrimination Directives. As was demonstrated above, this was to a certain extent beside the point, given that the essence of the questions referred was access to personal information held by an employer, in the context of equal treatment.

The AG chose two avenues to argue against a general right of plaintiffs to access information. First, he invoked *Kelly*, a case pertaining to a request for information additional to that already provided by an employer in relation to potential comparators. As the CJEU pointed out, *Kelly* was not sufficiently analogous to *Galina Meister*, as in *Kelly* redacted data were provided to the plaintiff.<sup>50</sup> Moreover, *Kelly* did not concern access to information relating to comparators, as that information was provided by the respondent before the Irish courts, albeit in a redacted manner. In *Kelly*, the man bringing a claim of sex discrimination requested access to additional personal data of his potential comparators when that information did not appear indispensable or adequate to support his claim.

The AG's other argument appears to be less relevant, so much so that the judgment omits to reflect on it. The AG's Opinion recalls that the Non-discrimination Directives 'not once expressly refer to a right to information held by the person "*suspected*" of [emphasis added] discrimination'.<sup>51</sup> Alarmingly, the reference to criminal law that the word 'suspected' conjures up makes this statement comparable to those advanced by the foes of the reversal of the burden of proof in various domestic contexts. In the Hungarian context, for instance, the Anti-reversalians – including a former Parliamentary Commissioner for Civil Rights – argue that the reversal of the burden of proof is in flagrant violation of the *presumption of innocence*. Clearly, the presumption of innocence is applied to defendants in criminal cases and can play no role in civil litigation. Thus, any indication of criminal liability appears to be rather unfortunate in the present context.

The AG's Opinion further recalls that the 'interested parties who have lodged written observations noted that, while the Commission tabled a proposal intended to establish a right to information for victims of discrimination, such a proposal has never been adopted in the final texts'. It then concludes that 'the absence of an express reference to a right to information' ought to be interpreted 'as the manifestation' of the legislature's 'intention not to affirm such a right'.<sup>52</sup> While such a conclusion appears hasty given the wider legislative and social context, it is arguably also totally unfounded. Clearly, the lack of an express reference to a right to information may indicate several considerations, including among others the lack of consensus at EU level on the issue and concerns relating to the limits of powers conferred upon the EU in the realm of civil proceedings and to the processing of sensitive data. Indeed, as mentioned above, when a right to information relating to such sensitive data is at issue in the context of equal treatment, the Non-discrimination Directives are far from being the only piece of EU legislation applicable.

Questions relating to ethnic data appear to be taboo, so much so that when a case turns on a person's *assumed ethnic origin* – personal data that is NOT sensitive – they seem to render reasonable debate or analysis impossible. Indeed, one wonders whether this was the reason behind the AG's failure to raise the 'question of rights of any third parties referred to in the documents or information submitted' by the respondent company. Had the case been argued on the grounds of sex and age only – personal data that are NOT classified as sensitive – the conclusions could have been substantially different. Still, it is

<sup>50</sup> *Galina Meister*, para. 44.

<sup>51</sup> *Galina Meister*, AG's Opinion, para. 21.

<sup>52</sup> *Ibid.*

unfortunate that on such an important issue the AG did not discuss the questions he himself raised – at least in relation to sex and age.

## Rules of disclosure

During civil proceedings, respondents are normally under a duty to provide the documents they possess and are requested to provide. A French judgment illustrates this: ‘the Defendant cannot argue that the Plaintiff’s evidence is inadequate if he failed to provide the documents requested by the court. The corollary of the right to have access to the evidence of the opposing party is that failure to comply transfers the burden of proof to the Defendant.’<sup>53</sup>

The Italian legal system does not have the concept of ‘discovery of documents’ prior to legal action, and in civil cases witness evidence must be gathered in court hearings. In Germany, too, as a general principle the witness testifies in court.

The questionnaire procedure or any other similar attempt can also facilitate access to information. In few Member States national law provides this tool to facilitate access to information needed to establish a *prima facie* case – the questionnaire procedure. Prior to making a formal complaint or starting a legal action, victims have the opportunity or obligation to contact the alleged discriminator and seek clarification of his or her conduct. Answers provided to such a questionnaire – or a lack of response – allow courts to draw inferences in relation to discrimination.

In Ireland the Equality Tribunal uses the questionnaire procedure. A person who believes that they may have experienced discrimination is entitled under domestic anti-discrimination legislation to write to the person they believe may have discriminated against them, asking for certain information. A statutory form of questionnaire (Forms EE.2 and ES.1) is available from the Tribunal and can be downloaded from the website. A statutory reply form gives the person who receives the questionnaire an opportunity to set out their version of events. This form is available (Form EE.3 and ES.2) from the Tribunal and can be downloaded from the website. Domestic anti-discrimination law permits the drawing of such inferences as seem appropriate from a respondent failing to reply or supplying false, misleading or inadequate information.<sup>54</sup>

In practice, equality bodies may be more effective in obtaining documents in support of a case. Some administrative bodies and the police can search the premises of defendants in order to recover documents. The Romanian Anti-discrimination Law obliges all public and private agents in possession of relevant documents to share them with the equality body (the NCCD) or face an administrative fine. However, similar provision is not made for the plaintiff when preparing for a court case. If the plaintiff chooses to file a complaint to the courts instead of the NCCD, only the court can request documents and the court order will be based on general rules of civil procedure.

In Germany, the Federal Anti-discrimination Agency is not a quasi-judicial body. Consequently, witness statements or documents are provided as a matter of voluntary cooperation. Other federal agencies, however, have to provide the necessary information to the Federal Anti-discrimination Agency, subject to the protection of personal data.

<sup>53</sup> *IBM v Buscail*, Court of Appeal, Montpellier, no. 0200504, 25 March 2003.

<sup>54</sup> For a sample questionnaire, see [http://www.equalitytribunal.ie/uploadedfiles/AboutUs/ee\\_2.pdf](http://www.equalitytribunal.ie/uploadedfiles/AboutUs/ee_2.pdf).

## Consequences of the judgment for equality bodies

Regrettably, the judgment may negatively impact on equality bodies across the EU by suggesting a more limited application of the burden of proof provisions, where unequivocal guidance would be needed. Indeed, equality bodies – especially those having quasi-judicial functions – would be well advised to further interpret the judgment for their national legal context.

The judgment is of further relevance to equality bodies that have an investigative role, i.e. that can discover documents and/or hear parties. Arguably, it places an additional burden on them to ask for documents in the right fashion.

Interestingly, the German Federal Anti-discrimination Agency is entitled to ask parties to a potential case of discrimination to provide a statement on the matter. There is no obligation to answer such a request. This rule aims to enable the Agency to collect information about the case in order to provide proper advice and is a potential step towards amicable settlement. The Agency reports that this procedure is used with some success.

## Consequences in the wider social context

Two main considerations arise in relation to the impact of the present judgment in the wider social context. Firstly, by failing to distinguish among the protected grounds at issue, the judgment has left the taboos surrounding information relating to ethnic origin untouched, while levelling down the discourse and protection due on the grounds of sex and age. Relatively simple questions, such as whether or not anonymous data on sex, age or assumed ethnic origin classifies as sensitive data, have remained unanswered. The judgment may thus serve as a convenient tool for those who wish to use the inaccessibility of ethnic data as an excuse to avoid discussing ethnicity-based discrimination.

Secondly, by failing to properly analyse under what circumstances domestic courts are called upon to base a presumption of discrimination on the respondent's failure to supply sufficient data, the CJEU may have furnished opponents of the reversal of the burden of proof with another argument.

## Conclusions

This article has analysed the AG's Opinion and the CJEU judgment rendered in the *Galina Meister* case. It welcomed the final verdict, while pointing out that the CJEU missed an opportunity to provide vital guidance on basic procedural issues. It extensively argued that the reasons provided by the CJEU were incomplete, flawed, and potentially dangerous in the wider social context. The AG's Opinion was found to address the questions raised by the referring court from the wrong angle. The article calls for a bolder approach to cases of race and ethnic origin based discrimination, essentially arguing for the need to answer questions relating to (assumed) ethnic data and *mala fidae* conduct on the part of respondents.

Certainly, legal professionals or case workers assisting victims can also learn from the judgment. Prior to a hopefully well-constructed referral on evidentiary concerns, and even prior to trial, they may obtain various pieces of evidence that can make it easier to establish a claim – including statistics, situation testing, questionnaires, audio or video recordings, forensic expert opinions and inferences drawn from circumstantial evidence.

Situation testing and prior inquiry analogous to the questionnaire procedure could have produced useful evidence in the case of *Galina Meister* as well. Even if a Member State's domestic legal provisions do not explicitly specify the questionnaire procedure as a means of evidence, general national rules on evidence

provide persons bringing an action with the right to use any evidence, including responses by an alleged discriminator to a written inquiry about their conduct.

Legal strategies can be used to prepare for proceedings properly. The same case may be taken before equality bodies, courts, labour/consumer/school inspectorates, and in few Member States, before the police. If the national equality body – or an inspectorate/police – has the power to obtain evidence otherwise not available, approaching that body prior to litigation in civil court may also prove fruitful.

Last but not least, the questions referred to the CJEU need to be properly constructed in order to trigger a judgment that can in fact provide effective judicial protection from discrimination.



Joz | 1990



Johdai | 1993



Marco | 1970





# European Legal Policy Update<sup>55</sup>

## **Commission initiates accelerated infringement proceedings against Hungary**

Following the adoption of new legislation under the new Hungarian Constitution, the European Commission has started legal action against Hungary over measures affecting its judiciary. On 17 January 2012, the Commission issued a letter of formal notice requesting further clarification regarding the retirement age for judges and prosecutors and Hungary's decision to lower the mandatory retirement age for judges, prosecutors and public notaries from 70 to 62 years as of 1 January 2012. According to the case law of the Court of Justice of the European Union (CJEU) interpreting Directive 2000/78/EC, there must be an objective and proportionate justification to lower the age retirement for one profession only.<sup>56</sup> Since Hungary failed to provide an objective or coherent justification for these measures, the Commission decided on 25 April 2012 to bring the case before the CJEU. In view of the urgency of the matter (the measure is likely to directly affect 236 judges in 2012) an expedited procedure has been followed.

*Internet source:*

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/395&type=HTML>

## **EU Commissioner Piebalgs, in charge of development, launches a new initiative to fight discrimination in developing countries**

On 1 June 2012 EU Commissioner Piebalgs announced a €20 million package to help NGOs to fight against discrimination on grounds of gender, racial or ethnic origin, religion or belief, disability and sexual orientation in developing countries. The funding will be made available through a Commission call for proposals in 2013. This new support package to NGOs is part of the European Instrument for Democracy and Human Rights (EIDHR), launched in 2006 to provide support for the promotion of democracy and human rights in EU third-countries.

*Internet source:*

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/547&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>55</sup> This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 1 January to 15 June 2012.

<sup>56</sup> C-447/09 of 13 September 2011, *Reinhard Prigge and Others v Deutsche Lufthansa AG*, not yet reported in the European Court Reports.

# Court of Justice of the European Union Case Law Update<sup>57</sup>

## References for preliminary rulings – Removal

*Case C-266/11 Dansk Funktionærforbund, Serviceforbundet acting on behalf of Frank Frandsen v Cimber Air A/S, action brought on 27 May 2011*<sup>58</sup>  
*OJ C 73, 10.3.2012, p. 25*

The *Vestre Landsret* (High Court of Western Denmark) was asked by the Court of Justice of the European Union whether it wished to maintain its reference for a preliminary ruling following its ruling in the *Prigge* case. The facts of the case in question were similar to *Prigge* as a collective agreement between an airline company and a trade organisation representing the airline company's pilots required pilots who had reached 60 years of age to automatically retire. On 9 November 2011, the national judge informed the Court that the reference for a preliminary ruling was withdrawn. The President of the Court consequently ordered that the case be removed from the register.

*Internet source:*

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:073:0025:04:EN:HTML>

## References for preliminary rulings – Application

*Case C-81/12 Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării, action brought on 14 February 2012*  
*OJ C 126, 28.4.2012, p. 6-7*

The case concerns a shareholder of a football club (*S.C. Fotbal Club Steaua București S.A.*) who made a statement in the media criticising the team's recruitment of homosexual players. The *Curtea de Apel București* (Bucharest Court of Appeal) referred the claim brought by Asociația ACCEPT to the CJEU asking whether this statement could be regarded as facts from which it may be presumed that there has been direct or indirect discrimination within the meaning of Article 10(1) of Directive 2000/78/EC. If the presumption is established, to what extent would there be *probatio diabolica* (a legal requirement to achieve an impossible proof) if the defendant is required to demonstrate that there was no discrimination and that in particular recruitment was not connected with sexual orientation? Finally, the referring court is also seeking to determine whether the fact that it is not possible under Romanian law to impose a fine after the expiry of a period of six months from the date of the facts is compatible with the EU requirement that sanctions must be effective, proportionate and dissuasive.

*Internet source:*

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:126:0006:02:EN:HTML>

<sup>57</sup> This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 1 January to 15 June 2012.

<sup>58</sup> *European Anti-Discrimination Law Review* (EADLR), issue 14, p. 36.

## References for preliminary rulings – Judgment

*Case C-415/10 Galina Meister v Speech Design Carrier Systems GmbH, Judgment of 19 April 2012*  
*OJC 165, 9.6.2012, p. 4*

Ms Galina Meister believed she suffered from less favourable treatment on the grounds of sex, age and ethnic origin in the field of employment. She sought compensation for discrimination before a labour court and asked for the successful candidate's file to be produced to enable her to prove that she was better qualified. The case ended up before the *Bundesarbeitsgericht* (Federal Labour Court), which decided to ask the CJEU whether candidates can claim a right to information on the basis of Directives 2000/43, 2000/78 and 2006/54. The second question relates to the possible consequences if that right is denied. The details of this case are explored in the article 'Getting it right the wrong way? The consequences of a summary judgment: the Meister case' by Lilla Farkas, on page 23 of this publication.

*Case C-132/11 Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH, Judgment of 7 June 2012*  
*Not yet published in the Official Journal*

Under Tyrolean Airways' collective agreement, advancement from category A to category B (and subsequent determination of salaries) required a three year period of service within Tyrolean Airways, excluding experience gained by working for Austrian Airlines or Lauda Air (airlines in the same group). The *Oberlandesgericht Innsbruck* (Higher Regional Court of Innsbruck) referred the case to the CJEU seeking to determine whether a clause taking into account only the professional experience acquired as a cabin crew member of a specific airline belonging to a group of companies, to the exclusion of identical experience acquired with another airline belonging to the same group, was compatible with Directive 2000/78/EC. The Court answered in the negative, stating that the collective agreement did not establish a difference in treatment on grounds of age, as the clause did not related to age or any event linked to age, but to experience.

*Internet source:*

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0132:EN:HTML>

# European Committee of Social Rights Update<sup>59</sup>

## *Complaint no. 81/2012, Action européenne des handicapés (AEH) v. France*

The complaint was lodged on 3 April 2012. The complainant organisation brought to the attention of the Committee the issue of access by autistic children and adolescents to education and access by young adults with autism to vocational training, alleging violation of Articles 10 (right to vocational training), 15 (right of persons with disabilities to independence, social integration and participation in the life of the community), taken alone or in combination with Article E (non-discrimination) of the European Social Charter (Revised).

## *Decision on merits of Complaint no. 64/2011 European Roma and Travellers Forum (ERTF) v. France*

The complaint, registered on 28 January 2011, related to the forcible eviction of Roma without provision of suitable alternative accommodation and systemic discrimination in access to housing, in violation of Articles 16 (right of the family to social, legal and economic protection), 19§8 (guarantees concerning expulsion), 30 (right to protection against poverty and social exclusion) and 31 (right to housing) of the Revised European Social Charter, read alone or in conjunction with the non-discrimination clause in Article E. On 24 January 2012, the Committee declared that the administrative expulsion decisions were incompatible with Article E of the Charter, in conjunction with Article 19§8, since they did not meet the principle of proportionality and targeted the Roma community in particular without being founded on an examination of personal circumstances. They were also in breach of Article E read with Article 31§2 as they were inconsistent with human dignity and did not take into consideration the risk of homelessness in the absence of alternative accommodation. In addition, failures to implement measures aiming to meet specific accommodation needs and to provide stopping places for Travellers constituted discrimination in access to housing, in violation of Article E read with Article 31§1. As a result, France had also failed to ensure the protection of vulnerable families, including Traveller and Roma families, in violation of Article 16. Finally the Committee found violation of the principle of non-discrimination with regard to the right to vote in the light of the practical difficulties faced by Travellers in exercising that right.

<sup>59</sup> This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 1 January to 15 June 2012.

# European Court of Human Rights Case Law Update<sup>60</sup>

*Vejdeland and Others v. Sweden (no. 1813/07), Fifth Section Judgment of 9 February 2012*

The applicants had distributed leaflets in a secondary school referring to homosexuality as ‘a deviant sexual proclivity’ with a ‘morally destructive effect on the substance of society’. Charged with agitation against a national or ethnic group (*hets mot folkgrupp*), they argued that they did not intend to express contempt or hatred against homosexuals as a group but rather wanted to encourage discussion in schools. After the Supreme Court ordered payment of fines ranging from €200 to €2,000 combined with suspended sentences and probation, they filed an application for review by the European Court of Human Rights (ECtHR), alleging violation of freedom of expression within the meaning of Article 10 ECHR.

The Court sought to determine whether the conviction was prescribed by the law and pursued one or more legitimate aims and whether it was necessary to achieve these aims in a democratic society. As they were convicted in accordance with Chapter 16, Article 8 of the Swedish Penal Code, the interference with the applicants’ freedom of expression was clear and foreseeable and prescribed by law. It served a legitimate aim, namely the protection of the reputation and rights of others. As regards the necessity test, the Court examined whether the conviction was proportionate to the legitimate aim and whether justifications for the interference were relevant and sufficient. In view of the seriousness and pejorative nature of the allegations, combined with the level of the penalties imposed in spite of the fact that the law envisages prison sentences of up to two years, the Court concluded that the conviction was not disproportionate to the legitimate aim pursued and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. Consequently, the conviction was not considered to have violated the applicants’ freedom of expression.

*Aksu v. Turkey (no. 4149/04), Grand Chamber Judgment of 15 March 2012*

The case concerned government funded publications (a book and two dictionaries) which allegedly contained remarks and expressions that were pejorative and negative stereotyped Roma/Gypsies. Specifically, the applicant (a Turkish national of Roma origin) claimed that the author had stated that Gypsies were engaged in illegal activities; make their living as thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers; and were polygamist and aggressive. The applicant requested the authorities to correct and remove any discriminatory expressions, to stop the sale of book and to seize all copies. Before the ECtHR, the applicant relied on Article 8 ECHR on private and family life, read in conjunction with Article 14 ECHR on prohibition of discrimination. The Court observed that the remarks and expressions used in the books constituted an attack on the Roma identity, which could not, however, constitute a difference in treatment on grounds of racial or ethnic origin as the applicants failed to produce evidence from which it could be presumed that there was discrimination. The Court therefore examined the case under Article 8 only and did not find any violation of the positive obligation imposed on the Turkish authorities to protect the private life of individuals belonging to ethnic minorities against derogatory stereotypical images. To that effect, the state must ensure a fair balance between the applicant’s right to private life and protection of freedom of expression (Article 10 ECHR). Considering the fact that the book was based on academic research and that dictionaries reflect the language used by society, sometimes in a metaphorical sense, the national courts had respected the positive obligation

<sup>60</sup> This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 1 January to 15 June 2012.

to secure effective respect for the applicant's private life. Consequently, the Court did not find a violation of Article 8 ECHR.

*Manzanas Martín v. Spain (no. 17966/10), Third Section Judgment of 3 April 2012*

The plaintiff alleged a difference in treatment on the grounds that his years in service as an Evangelical minister before he joined the general social security scheme were not taken in consideration for the calculation of his pension benefits. The Court observed that Catholic priests had been treated as salaried employees since 1977, to whom the general social security scheme had applied. Consequently they had their previous years of service taken into consideration on condition that they made the capital payments corresponding to the recognised contribution years. The general social security scheme had applied to Evangelical ministers since 1999, but without the possibility of having earlier years counted. The Court ruled that the refusal to count the applicant's earlier years of service towards the minimum period of pensionable service amounted to a difference in treatment on grounds of religious faith, in violation of Article 14 ECHR on prohibition of discrimination. The Court stated that the Spanish government failed to justify the reasons for maintaining the difference of treatment between Evangelical ministers and Catholic priests and ordered payment of €3,000 as compensation for non-material damages and €6,000 in respect of costs and expenses.

*Yordanova and Others v. Bulgaria (no. 25446/06), Fourth Section Judgment of 24 April 2012*

The case concerned the threatened forcible eviction of members of the Bulgarian Roma community living in a settlement located on municipal land in an area of Sofia (Batalova Vodenitsa), in spite of the fact that they had lived there from the 1960s without authorisation. In addition, their dwellings lacked appropriate basic sanitation and did not comply with construction and safety regulations. The applicants alleged that if the eviction order was enforced, it would breach their rights under Article 3 ECHR (prohibition of inhuman or degrading treatment), Article 8 (respect of private and family life), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination) and Article 1 of Protocol no. 1 (right to property).

The Court ruled that undoubtedly the enforcement of the eviction order would interfere with the applicants' right to respect for their homes. The Court therefore examined whether such interference would be lawful and necessary in a democratic society for the achievement of legitimate aims, namely to address problems regarding the absence of construction authorisation, adequate sanitary facilities and safety hazards. The Court stressed that a margin of appreciation was left to the authorities, which must, however, be narrow when individual's effective enjoyment of intimate or key rights is at stake. The authorities failed to prove that alternative measures had been explored pursuant to the principle of proportionality, which required the risk of homelessness to be taken into account. In addition, it appeared that the authorities refused to consider approaches specially tailored to the needs of the Roma community on the ground that this would amount to discrimination against the majority population, which denied the applicants' situation as a socially disadvantaged group. Article 8 ECHR did not impose an obligation to provide housing but rather an obligation to secure shelter for particularly vulnerable individuals in exceptional cases. The Court concluded that the disadvantaged position of members of the Roma community was not recognised in practice, in spite of targeted national and programmes, and that the removal order was not necessary in a democratic society, in breach of Article 8. As far as Article 14 was concerned, the Court observed it could not rule on whether a hypothetical future enforcement of the eviction order would be discriminatory on the basis of a hypothetical scenario. The Court did not find it necessary to examine Articles 3 and 13 separately. The Bulgarian state was ordered to pay €4,000 as costs and expenses.



Ten Slovak nationals of Roma origin alleged a racially motivated assault in a bar in a Slovakian village after a non-Roma waitress refused to serve a drink to a Roma. Later that evening, several men, some armed with baseball bats and iron bars and wearing masks, went to the Roma settlement where the applicants lived. They were reported to have forcibly entered three houses, causing damage inside and breaking windows, and to have shouted racist statements. They also caused injuries to two of the applicants. After police inspections of the houses and interviews with several of the applicants, a criminal investigation was carried out. Further interviews took place and the authorities requested records of calls by the waitress, her sons and the girlfriend of one of her sons. An analysis of biological material was compared with traces from the crime scene. However, the authorities suspended the investigation claiming that no evidence had been established allowing charges to be brought against a specific individual. The appeal brought by the applicants against the decision was declared inadmissible by the district prosecutor. Nevertheless, on her own initiative, the district prosecutor reviewed and quashed the decision and instructed further investigation, which was eventually suspended because of failure to collect sufficient evidence. However, the investigator considered that it was established that the attack had been preceded by the incident at the bar.

The Constitutional Court declared that the appeal to revoke the decision to suspend the investigation was inadmissible. The applicants referred the case to the ECtHR. In the light of the reported facts, the Court concluded that the treatment to which the applicants had been exposed fell within the scope of Article 3 ECHR (prohibition of inhuman or degrading treatment). The Court remarked that the authorities had not carried out all the necessary investigations, in particular in the context of the sensitive situation of the Roma in Slovakia. In addition, no action had been taken since January 2003 even though the investigation had not been terminated but merely suspended. The Court stressed that it was crucial to pay particular attention to investigate attacks with racial connotations, to protect minorities from the threat of racist violence and 'to reassert continuously society's condemnation of racism'. The Court therefore concluded that the investigations could not be considered as effective and violated Article 3 ECHR. Slovakia was ordered to pay as compensation for non-financial damage €10,000 to each applicant who had been physically injured and €5,000 to each of the other applicants.



# News from the EU Member States, Croatia, the FYR of Macedonia, Turkey, Iceland, Liechtenstein and Norway.<sup>61</sup>

More information can be found at <http://www.non-discrimination.net>

<sup>61</sup> This section provides as far as possible a selection of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 1 January to 15 June 2012.

*Legislative developments***Criminal Code provisions on prohibition of incitement to hatred amended**

New amendments to §283 of the Criminal Code have extended the definition of incitement to hatred to include race, colour, language, religion or belief, citizenship, descent or national or ethnic origin, gender, disability, age and sexual orientation. Previously, an act of incitement needed to be public and have the effect of endangering public order. Under the new provisions, it is sufficient that the act affects the public (*breite Öffentlichkeit*). Finally, the new provisions cover groups at large but also individuals characterised by their affiliation to a specific group. The new provisions entered into force on 1 January 2012.<sup>62</sup>

*Internet source:*

<http://www.justiz.gv.at/internet/file/2c94848525024c28012568b8566501ab.de.0/vorblatt+-+erlaeuterungen+-+textgegenueberstellung.pdf>

*Case law***Same court issues two contradictory compensation orders**

The Viennese Commercial Court issued two contradictory rulings on two distinct but similar cases.

In the first case, a dark skinned man was refused access to a restaurant which his partner and colleagues entered without any problem. The court of first instance found discrimination on grounds of ethnic origin in favour of the plaintiff and awarded €1,000 as compensation. In the appeal brought by the defendant before the Viennese Commercial Court, the compensation award was upheld.<sup>63</sup>

In the second case, a dark skinned woman was denied access to a restaurant by the doorman because of her colour. The court of first instance found discrimination and awarded €1,500 as compensation. The Viennese Commercial Court reduced compensation to €250, considering that the initial amount was disproportionate with regard to the slight pain suffered by the victim.

**Wheelchair-users face discrimination in access to a bakery**

A bakery in Vienna installed a new 15.5 cm stair at the entrance, and new ramps were placed at the side entrances with a gradient of 22 per cent. Following the renovation work, a regular customer could no longer access the bakery and decided to lodge a complaint before the court of first instance after the compulsory reconciliation procedure failed, asking for €1,000 as compensation. The court found a clear breach of §4 of the Federal Disability Act and awarded the compensation requested.

*Internet source:*

[http://www.klagsverband.at/dev/wp-content/uploads/2012/02/BG-Josefstadt-4C707\\_11z-anonym.pdf](http://www.klagsverband.at/dev/wp-content/uploads/2012/02/BG-Josefstadt-4C707_11z-anonym.pdf)

<sup>62</sup> Federal Law Gazette no. 103/2011.

<sup>63</sup> 'In view of the intended preventive effect of compensation for immaterial damage provided under the Equal Treatment Act (...) the level of compensation cannot be compared to compensation for pain and suffering [*Schmerzensgeld*] under §1325 ABGB (General Civil Code) – as is clear from the existence of a legally fixed minimum amount of compensation that is otherwise alien to the concept of compensation. Insofar as the defendant wishes to infer that the compensation awarded is inappropriate in comparison to customary awards of compensation for pain and suffering, it cannot convince the Court.' Case no. 1R129/10g, of 19 January 2011.

## Legislative developments

### New anti-discrimination legislation adopted by the German-speaking Community

On 17 May 2004, the German-speaking Community adopted a Decree on the Guarantee of Equal Treatment on the Labour Market (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*) which implemented Directives 2000/43, 2000/78 and 2002/73, but only with respect to bodies or persons falling under the competence of the German-speaking Community.<sup>64</sup> In June 2007, it was further amended in order to comply with EU law. However, gaps remained in the implementation of the Directives, notably regarding discrimination based on race or ethnic origin in education and in access to goods and services. The Decree was eventually repealed with the adoption of a new decree on 19 March 2012 on opposition to certain forms of discrimination (*Dekret zur bekämpfung bestimmter formen von diskriminierung*).<sup>65</sup>

The new legal instrument lays down a general framework for combating discrimination within the powers exercised by the German-speaking Community. It aims to implement Directives 2000/43, 2000/78, 2004/113 and 2006/54 in the fields of labour relations, education, employment, social advantages, cultural matters, personal matters and access to and supply of goods and services available to the public.

#### Internet source

<http://reflex.raadvst-consetat.be/refLex/pdf/Mbbs/2012/06/05/121514.pdf>

#### Case law

### The dismissal of an employee wearing the headscarf may be justified to preserve the neutrality of a private company

On February 2003, a Muslim woman was hired under a permanent employment contract as a receptionist by a private company providing catering services to private and public sector clients. In April 2006, she informed her superior that she wanted to wear the headscarf during working hours. In a conversation with the head of office, she learned that wearing a headscarf would not be tolerated as any visible political, philosophical or religious symbol was incompatible with the company's policy of neutrality. The board of directors amended the staff regulations in order to prohibit the wearing of any visible symbol expressing political, philosophical or religious convictions. After she refused to remove her headscarf, her employment contract was terminated with a severance package equivalent to three months of salary. The woman, with the support of the Centre for Equal Opportunities and Opposition to Racism, initiated a legal action. She asked for €13,220.90 as compensation for unfair dismissal, alleging direct and indirect discrimination on the grounds of religion, as prohibited by the Anti-discrimination Act of 25 February 2003, and violation of religious freedom, as guaranteed by Article 9 of the European Convention on Human Rights. The case ended before the Labour Court of Appeal of Antwerp, which rejected the claim considering that unfair dismissals require manifestly unreasonable behaviour from the employer. At the date of the relevant facts, the Anti-discrimination Act of February 2003 was in force and not yet repealed by the General Anti-discrimination Act of 10 May 2007, which therefore could not be invoked. The Court held that since the prohibition applied to all employees, there was no difference in treatment. In addition,



<sup>64</sup> Official Journal/Moniteur belge, 13 August 2004.

<sup>65</sup> Decree of the German-speaking Community on opposition to certain forms of discrimination of 19 March 2012 (*Dekret zur bekämpfung bestimmter formen von diskriminierung*), Official Journal/Moniteur belge, 5 June 2012, p. 31670. The Decree came into force on 15 June 2012.

the Court found that even if indirect discrimination was proven, it could be justified by an objective and reasonable aim, while religious freedom was not an absolute right and could be subject to limitation. The Court therefore concluded that an employer could prohibit the wearing of any religious signs in order to preserve the neutral image of the company. In the light of those conclusions, the dismissal was not found unreasonable.

Internet source:

[http://www.diversite.be/index.php?action=artikel\\_detail&artikel=640](http://www.diversite.be/index.php?action=artikel_detail&artikel=640)

### **Murder handled as homophobic hate crime for the first time by Belgian authorities**



The corpse of Ihsane Jarfi, a gay Muslim of 32 years old, was discovered by two hikers one week after his disappearance. The victim was reported missing after a night out in a gay bar in Liège. According to witnesses, he voluntarily entered the car of four men when he left the bar. It is thought that after Ihsane Jarfi made sexual advances to the men, they decided to 'give him a lesson' by beating him up and leaving him naked in a field in the middle of the night. The four suspects were identified and two told the police that the victim was still alive when they left him. However, the judicial authorities decided to charge the four suspects with robbery with violence, forcible confinement and murder, with homophobic intent as an aggravating circumstance.

Since the adoption of the Federal Act of 10 May 2007 on opposition to certain forms of discrimination, the Criminal Code provides for increased penalties when one of the motives of the offence is hatred, disdain or hostility toward a person by reason of his/her sexual orientation. This is the first time that a murder has been treated as a homophobic hate crime by the Belgian judicial authorities under the new anti-discrimination law.

### **Riots further to the prohibition on the wearing of the *niqab***



The Federal Act prohibiting the wearing of any clothing that totally or partially covers an individual's face was adopted on 1 June 2011 and entered in force on 23 July 2011.

On 31 May 2012, a Muslim woman was arrested and escorted to the police station of Molenbeek (a municipality in Brussels) after she refused to remove a veil totally covering her face during an ID check. At the police station she head butted one police officer when she was asked again to remove her *niqab*, causing injuries to herself and two officers. In the meantime, mobile phone messages called on protestors to gather outside the police station, which eventually led to rioters throwing metal barricades and cans at police officers. The mayor of Molenbeek publicly affirmed that Sharia4Belgium, an Islamic fundamentalist organisation, was behind the trouble.

The following day, the Sharia4Belgium spokesman declared at a press conference that he was proud of the woman's behaviour. He recommended the injured policewoman to undergo cosmetic surgery 'since Western women enjoy being an object of desire so much'. He also stated that Muslims did not have any respect for non-Muslims, and concluded that Islam and its life style precepts were superior. One week later, he was arrested and accused of incitement to riots and hatred against non-Muslims. The arrest warrant issued against him was upheld and prolonged by a month on 12 June 2012 by the competent court (*Chambre du Conseil* of Antwerp – a chamber of the first instance criminal court which renders decisions on arrest warrants).

The Minister of the Interior condemned the spokesperson's statements and declared that a specific plan to strengthen efforts to combat radical fundamentalism would be tabled.



# Bulgaria

B G

## *Case law*

### **Recent cases of incitement to hatred**

The Pazardzhik Regional Court sentenced two men for having publicly performed a Nazi salute on 19 April 2009, the eve of Hitler's birthday. The two men were found guilty of 'preaching a Fascist ideology' and 'incitement to racial or religious hatred' on 16 December 2011.<sup>66</sup> They were put on probation and ordered to pay a fine of €2,500. At the time of writing the sentence was subject to appeal.

The Varna District Court sentenced a man for incitement to violence against the Roma on Facebook.<sup>67</sup> He created an event named 'Gypsy Slaughter', which 76 participants confirmed they were attending. He was sentenced to prison but the sentence has been suspended.

# Croatia

H R

## *Legislative developments*

### **Amendments to the Anti-discrimination Act**

In April 2012 a working group charged with drafting amendments to the Anti-discrimination Act was put in place in order to respond to the most pressing issues addressed by the European Commission. The drafted amendments were then presented to NGOs.

All amendments concern exceptions to the prohibition of discrimination. The exception relating to the aim of preserving health and preventing criminal acts and misdemeanours previously required that the means to achieve this aim be appropriate and necessary, which is no longer the case. No difference in treatment based on religion, gender, national or social origin, sexual orientation, disability and age would be allowed in the future.

A difference in treatment based on age would not be permitted when determining risks and contributions for the basic pension scheme.<sup>68</sup>

As regards incitement to discrimination, intention would be irrelevant and any encouragement to discriminate would be punishable.

Amendments to the Anti-discrimination Act are expected to pass through Parliament in autumn 2012. Further amendments are to be expected in the near future.

<sup>66</sup> Articles 108 and 162 of the Criminal Code.

<sup>67</sup> Article 162 of the Criminal Code.

<sup>68</sup> Different treatment on the ground of gender is permitted under certain circumstances.

*Case law***Age limit in job advertisements reviewed by Supreme Court**

A complainant claimed before the Labour Court that she had been refused employment because of her age<sup>69</sup> and asked for CYP 288,257 (approximately €555,754) as compensation. The Court ruled that it did not have jurisdiction because the facts took place before employment had started, but recognised discrimination during the recruitment procedure and awarded €1,500 as compensation. The complainant filed an application for review of the decision by the Supreme Court, with regard to the issue of competence as well as compensation.

The Supreme Court declared the Labour Court had erroneously asserted its lack of jurisdiction.<sup>70</sup> As far as compensation was concerned, the Court relied on the CJEU ruling in *Draehmpaehl*,<sup>71</sup> which distinguished between cases where applicants would have been hired in the absence of discrimination and cases where applicants would not have been hired anyway because they were not sufficiently qualified. According to the Court, the candidate eventually hired was better qualified and upheld the amount of compensation originally granted by the Labour Court. In addition, the Court awarded interest on the sum of €1,500 starting from the year that the complainant applied for the job in question.

**Challenge to financial prizes awarded to athletes with disabilities**

The complainants, three athletes with disabilities expected to participate in the 2008 Paralympic Games in Beijing, challenged the validity of a decision determining the level of reward granted to athletes (together with the legality of the scheme introducing discrimination against athletes with disabilities) since the amount granted to non-disabled athletes was higher.

The Supreme Court found against the applicants, observing that they lacked legitimate interest as the claim was premature with regard to their expected participation in the Paralympic Games.<sup>72</sup> The judge also stated that the level of entitlement was based on the actual performance of the athlete, and this could not have been known at the time of filing the action, as mere participation or expectation was not sufficient.

The Court did not invoke any of the provisions of Act 127(I)/2000 (Disabled Persons Act) as amended to transpose the provisions of Directive 2000/78/EC. The plaintiffs were also ordered to pay the respondent's costs.

**Age limit in the police force examined by the equality body**

The complainant challenged the maximum age limit of 40 years specified by Article 17A(1) of the Police Acts 2004-2012 as a prerequisite for appointment to the specialised position of Captain Third Class of a Police Boat. He claimed that the provision was in breach of the Act on Equal Treatment in Employment

<sup>69</sup> The job advertisement set out a maximum age limit.

<sup>70</sup> Supreme Court decision in the case of *Avgoustina Hadjiavraam v. Cooperative Credit Corporation of Morphou*, Appeal no. 287/2008 of 11 July 2011.

<sup>71</sup> Case C-180/95 [1997] ECR I-2195.

<sup>72</sup> Supreme Court decision no. 1377/2008 of 30 January 2012: *Andreas Potamitis, Carolina Pelendritou, Evripides Georgiou v. Cyprus Sports Organisation*.

and Occupation transposing Directive 2000/78/EC. The police authorities argued that the age limit fell within the exception provided by Directive 2000/78/EC for a legitimate aim with an objective and reasonable justification. In the present case, they invoked operational capacity, responsiveness and alertness.

The equality body found that operational readiness was certainly legitimate but the means used to achieve that aim were not appropriate or necessary as the complainant was already a member of the police force, with 20 years of experience.<sup>73</sup> The presumption that older people are no longer in good physical condition is based on stereotypes and hypotheses which may not necessarily be correct and which could turn out to be prejudicial. The equality body therefore found direct discrimination on grounds of age.

Using the powers granted to it under Article 39 of Opposition to Racial and Other Forms of Discrimination (Commissioner) Act N42(I)/2004, the equality body notified its findings to the Attorney General who, under the same legal provision, is under the obligation to advise the competent minister on legal measures to adopt and prepare a relevant proposal to redress the breach.

*Internet source:*

[http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/243F024A4AA25064C22579B9003934E0/\\$file/AKI32.2008-06022012.doc?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/243F024A4AA25064C22579B9003934E0/$file/AKI32.2008-06022012.doc?OpenElement)

### **Accessibility of sports venues by people with disabilities examined by the equality body**

A journalist filed a complaint against the Cyprus Sports Organisation (KO) alleging non-accessibility of football pitches to people with disabilities. Being a paraplegic himself, he claimed that the absence of suitable infrastructure prevented him from accessing the field on a wheelchair, which also affected his work as a journalist. The equality body carried out a wide investigation of football pitches, which revealed that only recently built facilities were wheelchair accessible. Most lacked sufficient infrastructure as, for instance, toilets were not suitable for wheelchairs users.



The equality body found in favour of the complainant, stating that there were long-standing gaps in the provision of adequate infrastructure, in spite of national, European and international standards.<sup>74</sup> This created a hostile environment, causing social exclusion among people with disabilities. It stressed that the concepts of 'accessibility' and 'reasonable accommodation' were complementary and that the obligation to provide reasonable accommodation did not prevent specific measures from being taken to ensure accessibility, in particular when services were offered to the public. The report recommended all competent authorities to focus their efforts on immediate redressing the situation, as failure to do so would render Cyprus liable for violation of international obligations.

*Internet source:*

<http://www.no-discrimination.ombudsman.gov.cy/ektheseis-aki>

### **Refusal to promote a member of an ethnic minority amounts to discrimination**

An employee of Cyprus Airways, belonging to the Maronite community,<sup>75</sup> alleged discrimination on grounds of ethnic origin in promotion. As standard practice, when appraising employees for promotion, the selection committee takes into account their experience, merit, seniority, skills and competence in relation to the position, performance and length of service, as well as the evaluation and recommendation of the relevant superior.



<sup>73</sup> Equality body decision Report Ref. A.K.I. 32/2008 of 6 April 2012.

<sup>74</sup> Equality body decision Ref. A.K.I 30/2010 & A.I.T 1/2012 of 29 May 2012.

<sup>75</sup> The Maronite community is one of the three religious groups recognised in the Constitution. It has been granted the status of national minority under the Framework Convention on National Minorities. It forms part of the Greek Cypriot community and to a large extent enjoys a fairly high degree of social integration.



The complainant, with three other candidates out of nine in total, had a postgraduate degree, which was an asset. Given the absence of appraisal since 1998, the committee decided to consider recommendations of the director of the department with regard to candidates' merit, capabilities and suitability. Three candidates were eventually selected, one of whom did not have a postgraduate degree and two who had eight years of service less than the complainant.

The equality body noted that the director's recommendation was not consistent with the fact that the complainant had all the necessary qualifications, plus a postgraduate degree and longer experience of service.<sup>76</sup> The complainant's obvious advantage over the other candidates should have been taken into consideration by the director, who therefore failed to provide convincing reasons to justify the decision not to promote. The equality body could consequently not exclude the possibility of discrimination on grounds of ethnic origin. It recommended that Cyprus Airways justified future decisions to promote employees.

*Internet source:*

<http://www.no-discrimination.ombudsman.gov.cy/ektheseis-aki>

## Czech Republic

CZ

### *Case law*

#### **Disabled parking in residential areas examined by equality body**

People with disabilities are generally allowed to park their cars in reserved spaces close to shops or offices. The Road Administrative Authority can also allocate a parking place in a residential area for exclusive use by a disabled person. However, the owner of the street where the parking space is to be situated (most frequently the local municipality) needs to give their consent. According to recommendations issued by the equality body, a request from a person with a disability must in principle be satisfied unless there is an objective obstacle which would require a careful examination of the situation. Other facts, such as the type of disability, will be considered only when it is not possible to satisfy all parties (e.g. because of inadequate parking space in the residential area). If substitute parking solutions are found, it must be checked that the disabled person can effectively use this alternative. A clear and careful justification for the decision must be given each time a request is rejected.

*Internet source:*

[http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Doporuceni/Doporuceni-parkovani\\_159-2011.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Doporuceni/Doporuceni-parkovani_159-2011.pdf)



<sup>76</sup> Equality Authority decision Ref. A.K.I 8/2010 of 9 November 2011.

*Legislative developments***Act establishing the Equal Treatment Board revised**

A bill amending the Equal Treatment Board Act was introduced on 28 March 2012 by the Minister of Employment.<sup>77</sup> Only minor changes were proposed, such as the nomination of a high court judge as the body's chair. The bill entered into force on 1 July 2012.

*Internet source:*

<https://www.retsinformation.dk/Forms/R0710.aspx?id=140966>

**Amendments to the act establishing the Danish Institute for Human Rights**

A new act adopted on 29 May 2012 guarantees the independence of the Danish Institute for Human Rights and clarifies its role with regard to the promotion of equality and non-discrimination and its mandate as the specialised equality body for race and ethnic origin, as well as gender.

Under the new act, the Institute must submit an annual report on the situation as regards human rights to Parliament, including the situation of people with disabilities. In addition, pursuant to a Parliament decision of 17 December 2010,<sup>78</sup> the institution is responsible for monitoring implementation of the UN Convention on the Rights of Persons with Disabilities.

The Act will enter into force on 1 January 2013.

*Internet source:*

[http://www.ft.dk/samling/20111/lovforslag/L154/som\\_vedtaget.htm#dok](http://www.ft.dk/samling/20111/lovforslag/L154/som_vedtaget.htm#dok)

*Case law***Asperger's syndrome is not recognised as a disability**

The case concerned a childminder who claimed that she was discriminated against on the grounds of the disability of her son, who suffered from Asperger's syndrome (a form of autism). She was dismissed while she was taking leave to take care of her son. The employer denied that her dismissal was due to her son's condition and alleged that it was solely based on necessary budgetary cuts. Finally, the employer also argued that Asperger's syndrome did not constitute a disability.

The Equal Treatment Board noted that Asperger's syndrome constituted a permanent disorder that cannot be cured.<sup>79</sup> It continued by stating that in principle a diagnosis does not by itself predict the specific impairments that an individual will actually suffer as the illness develops over time. The Board, on the basis of medical records, observed that the plaintiff's son showed normal psychomotor speed and no symptoms of psychosis, depression or anxiety. It also underlined that the boy had been under medical treatment over the past six months. In the light of these observations, the equality body concluded that any possible impairments suffered by the complainant's son in the long run could not be deemed with sufficient certainty to constitute disability within the meaning of the Anti-discrimination Act. The complainant had not therefore faced discrimination because of her son's disability.

<sup>77</sup> Bill L 119.

<sup>78</sup> B 15.

<sup>79</sup> Decision no. 275/2012 of 9 May 2012.



Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=892&type=Afgoerelse>

### **Employer convicted of failure to provide reasonable accommodation to an employee with back problems**

The complainant worked as an administrative assistant with the local police and prosecutor's office. Due to reorganisation, it was planned to transfer her to another department in another city. Citing the severe back problems that forced her to work part time, she explained that she would not be able to travel by car or bus as she could not sit for long periods. She suggested that she be transferred to another department within the same city. The employer rejected her request and relocated her to another city. After a few days of work in the new location, she had to go on sick leave because of severe pain caused by travelling. She was dismissed one and a half months later.



The Equal Treatment Board observed that the back problems had resulted in permanent impairments which constituted disability within the meaning of the Act on the Prohibition of Discrimination on the Labour Market.<sup>80</sup> The employer was under the duty to provide reasonable accommodation to enable the complainant to perform her work. To maintain the plaintiff in her original location did not constitute a disproportionate burden. The Board therefore established discrimination on grounds of disability and ordered the employer to pay the equivalent of nine months' salary as compensation (DKK 225,000, approximately €30,000).

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=893&type=Afgoerelse>

### **Requirement to taste pork in an educational programme to become a nutrition assistant constitutes direct discrimination**

A Muslim woman studying to become a nutrition assistant was forced to quit a vocational training programme since her school would not exempt her from the requirement to taste pork. She agreed to touch and prepare food made from pork but refused to taste meals made with pork due to her religious convictions. She argued that her religion would not interfere with her work as there would always be a colleague to taste pork for her, if necessary. She subsequently claimed discrimination on grounds of religion and wrote to the Ministry of Education.



The Equal Treatment Board observed that eating pork was incompatible with plaintiff's religious beliefs, which established facts from which it could be presumed that she had experienced indirect discrimination on grounds of religion.<sup>81</sup> The Board concluded that the vocational institution could not sufficiently demonstrate that it was a necessary requirement to taste pork to complete her education as a nutrition assistant. Her willingness to cooperate in the preparation of pork was underlined, as well as the fact that she had tasted all other food. Finally, the Board stressed that she could not complete her education because of this requirement. The plaintiff was awarded DKK 75,000 (€10,100) as compensation for indirect discrimination on grounds of religion.

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=829&type=Afgoerelse>

<sup>80</sup> Equal Treatment Board Decision no. 276/2012 of 9 May 2012.

<sup>81</sup> Equal Treatment Board Decision no. 213/2012 of 8 February 2012.

## Lawfulness of religion-related questions during job interviews under examination



In one case, the complainant applied for a job as a technician. During his job interview, the employer asked him whether he was Muslim and how he felt about the Danish traditional sense of humour. The Equal Treatment Board ruled that the question violated Section 4 of the Act on the Prohibition of Discrimination in the Labour Market, which precludes employers from asking questions relating to religion during job interviews.<sup>82</sup> The complainant was granted DKK 2,500 (€335) as compensation, taking into consideration the employer's attempt during the interview to portray the company as offering a good working environment with many nationalities represented and a canteen which caters for employees' religious dietary needs.

By contrast, in another case an employer asked during a job interview whether the candidate would take off her headscarf during working hours. As she answered that she would not, the employer decided not to hire her. She filed a complaint alleging discrimination on grounds of religion. The Equal Treatment Board noted that the company had internal uniform rules and that employees could only wear the headscarf provided by the employer.<sup>83</sup> Such in-house rules were totally lawful according to the Board and the employer had posed the question in order to ascertain whether the candidate was aware of these conditions. However, the Board acknowledged that it would have been more appropriate to ask whether she was willing to wear the company's headscarf instead of asking her whether she would take off her own veil. In the light of these observations, the Board concluded that there was no evidence to establish that the decision to reject the applicant was based on her religion.

*Internet source:*

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=843&type=Afgoerelse>

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=876&type=Afgoerelse>

## Pilots faced discrimination on grounds of age



A pilot's employment contract was ended when he turned 60 years of age. According to the collective agreement between his airline company and the trade union, compulsory retirement was fixed at 60, for internal safety reasons. The pilot initiated a legal action alleging discrimination on grounds of age.

The Western High Court did not find that the safety regulations were objectively and reasonably justified by any legitimate aim.<sup>84</sup> Referring to the recent *Prigge* case before the Court of Justice of the European Union,<sup>85</sup> the Court concluded that a dismissal based solely on the safety regulations inserted into the collective agreement violated the Act on the Prohibition of Discrimination in the Labour Market. The Court granted nine months of salary as compensation to the victim and observed that the amount of compensation was determined by the severity of the violation measured by the following indicators:

- The compulsory retirement age in the collective agreement was in direct contradiction with international age requirements for pilots;
- Before the dismissal, the pilot and his trade union had raised the issue that the compulsory retirement age was discriminatory and had also inquired several times about the possibility of the pilot pursuing his employment in spite of the retirement age, which the airline did not look into;
- The pilot had been employed by the airline for a period of 36 years.

*Internet source:*

<http://www.domstol.dk/VestreLandsret/nyheder/pressemeddelelser/Pages/Forskelsbehandlingpaagrundafalder.aspx>

<sup>82</sup> Equal Treatment Board Decision no. 227/2012 of 22 February 2012.

<sup>83</sup> Equal Treatment Board Decision no. 259/2012 of 11 April 2012.

<sup>84</sup> Western High Court Decision of April 12, 2012, B-1065-08.

<sup>85</sup> C-447/09.

## Legislative developments

### Amendments to the Penal Code regarding incitement to hatred proposed

The Estonian opposition Centre Party has initiated a bill proposing amendments to Article 151 (incitement to hatred) and Article 58 (aggravating circumstances) of the Penal Code.<sup>86</sup>

Incitement to hatred and violence and public incitement to discrimination on grounds of ethnicity, race, colour, sex, language, origin, religion, sexual orientation, financial or social status, or political opinion would constitute misdemeanours punishable by fine or prison. The bill proposes to increase the fine applicable to legal persons from €3,200 to €6,000.

Fines or prison for up to three years for acts of incitement constituting a criminal offence<sup>87</sup> would not be affected. The bill would, however, introduce a new criminal offence of incitement to hatred causing severe breach of public order. Legal persons would be sentenced with either a fine or compulsory dissolution.

Finally, the bill amends Article 58 of the Penal Code and would add motives of ethnic, racial and religious hatred to the list of aggravating circumstances. At the time of writing, the bill was undergoing its first reading.

Internet source:

<http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=1503517&u=20120612160020>

# France

## Case law

### Prohibition from wearing the Islamic veil during school trips is lawful

The internal regulations of the Paul Lafargue elementary school in Montreuil (eastern suburbs of Paris) provide that ‘parents volunteering to accompany children during school trips must honour, with their garments and behaviour, the neutrality of state education’. The plaintiff claimed that the rule prevented mothers who wear the Islamic veil from accompanying their children on school trips.



The Administrative Court of Montreuil ruled that parents joining school trips assented to the principle of neutrality and must respect it.<sup>88</sup> This rule did not constitute an excessive hindrance to the freedom of religion as protected by Article 8 of the European Convention of Human Rights, since the restriction was justified by the interests of the child in the context of children’s integration into state education. The measure was not discriminatory as it did not take into consideration the parent’s religion.

<sup>86</sup> Bill no. 250.

<sup>87</sup> For instance, if they cause serious consequences, if they are committed by a person who has previously been sentenced for similar conduct or if the act is committed by a criminal organisation.

<sup>88</sup> Administrative Court of Montreuil, Decision no. 102015, 22 November 2011.



## Airline company Easyjet convicted of denying access to passengers with disabilities

Between November 2008 and January 2009, three passengers using a wheelchair were denied access to an aircraft on the grounds of safety requirements. The airline company Easyjet and its sub-contractor Europe Handling (responsible for gate staff) alleged that the passengers were not sufficiently independent and that they were not accompanied. Article 3 of Regulation 1107/2005 of 5 July 2006 prohibits air transport companies from preventing passengers boarding on grounds of disability. In the present case, both the company and the sub-contractor were prosecuted pursuant to Articles 225-1 and 225-2 of the Penal Code for refusal to give access to goods and services and making access to goods and services contingent on a condition relating to disability. They argued that they did not have sufficient staff resources to provide special assistance to passengers with disabilities.



The court of first instance ruled that the systematic refusal to allow persons with disabilities to board without providing any personal assistant and without checking whether or not they could actually travel alone constituted discrimination on grounds of disability.<sup>89</sup> Moreover, standard practice in the sector showed that other airline companies provide such assistance.

Easyjet was fined €70,000 and its sub-contractor €25,000. In addition, they both have to pay €2,000 as compensation to each plaintiff.

## Mandatory early retirement age fixed by the national state-owned railway company deemed unlawful

After 27 years of employment, the national state-owned railway company (SNCF) ended the plaintiff's employment contract as he had turned 55, granting him an annual pension of €7,619. The plaintiff challenged the decision, alleging that employees retiring at the age of 65 were granted €10,420 and that he had faced discrimination.



The Court of Cassation held that the fact that a decree allowed mandatory early retirement did not preclude the possibility of a decision being incompatible with anti-discrimination legislation. Mandatory retirement may not be considered as discriminatory depending on the justification brought forward by the employer, in particular in relation to health and security or professional integration as provided for by Article 1133-2 of the Labour Code. In the present case, the financial justification of reducing the number of staff employed by the company did not meet the requirement of Directive 2000/78/EC regarding social and political objectives. Consequently, the decision was annulled and the employer was ordered to reinstate the plaintiff and to contribute to his retirement scheme for the period when he had not been employed. In addition, the company was sentenced to pay €130,137 as compensation for the difference between the pension received and the salary he would have earned as an employee and €10,000 for non-material damages.

*Internet source:*

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025358367&fastReqId=1204005070&fastPos=1>

<sup>89</sup> Court of first instance (Tribunal de Grande Instance) of Bobigny, decision no. 0833980671 of 13 January 2012.

# FYR of Macedonia

## Legislative developments

### Consultation launched on the draft Equality and Non-discrimination Strategy

The Ministry of Labour and Social Policy initiated a public consultation on the draft *Equality and Non-discrimination National Strategy* in November 2011. The consultation included a public presentation of the strategy,<sup>90</sup> which covers age, gender, ethnicity and disability, to be implemented over the period 2012-2015. The strategy does not provide any action plan or budget for the time being. Its general aim is to advance and implement equal rights and equal opportunities in different areas of social life. Three general goals have been established, namely improving the legal framework for equality and non-discrimination, capacity building of institutions for the prevention of and protection against discrimination and promotion of equal opportunities, including of the concepts of equal opportunities and non-discrimination as well as awareness-raising of the different types of discrimination.

Several NGOs, in particular the Coalition for the sexual and health rights of marginalised communities, have raised concerns about the list of grounds covered, arguing that the absence of sexual orientation constitutes another step towards further marginalisation of the LGBT community in the Republic of Macedonia. Furthermore, they challenged the transparency of the strategy's drafting process as only a few civil society organisations were involved.

Internet source:

[http://www.mtsp.gov.mk/WBStorage/Files/strategija\\_ednakvost.doc](http://www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc)

# Germany

## Case law

### Age discrimination in the public administration



The case concerned a female civil servant who applied for the position of First Counsellor and whose application was not considered because of her age.

The Administrative Appeal Court (OVG) of Lüneburg held on 10 January 2012 that public appointments must comply with the Equal Treatment Act (AGG) and therefore the plaintiff must be awarded one month's salary as compensation.<sup>91</sup> Oral evidence was brought forward to establish discrimination.

Internet source:

[www.rechtsprechung.niedersachsen.de](http://www.rechtsprechung.niedersachsen.de)

<sup>90</sup> Government of the FYR of Macedonia and Ministry of Labour and Social Policy. *Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол (2012-2015)* [National Strategy for Equality and Non-discrimination on Grounds of Ethnicity, Age, Disability and Gender (2012-2015)]. [http://www.mtsp.gov.mk/WBStorage/Files/strategija\\_ednakvost.doc](http://www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc).

<sup>91</sup> Ref 5 LB 9/10.



## Validity of a collective agreement challenged with regard to the number of paid days of holiday based on age

Under a collective agreement in the public sector, civil servants are entitled to 26 days of paid holiday until they reach the age of 30; 29 days of paid holiday until the age of 40; and 30 days of paid holiday from age 40. An employee challenged this rule, alleging discrimination on grounds of age.



The Federal Labour Court (*Bundesarbeitsgericht*) held that the provision constituted discrimination on grounds of age, in violation of Section 9 of the Equal Treatment Act (AGG), for which no justification was possible.<sup>92</sup> The provision did not serve the purpose of providing more holidays to older employees to meet specific needs, if such needs existed. Consequently the Court concluded that younger employees are also entitled to longer holidays.

## Racial profiling deemed lawful

The plaintiff was checked by the police on a train on grounds of his colour, in the context of routine checks to combat irregular migration. He brought the case to the administrative court, seeking a declaratory judgment on the illegality of such checks.

The administrative court confirmed the legality of the identity checks without addressing the issue of discrimination.<sup>93</sup> The federal police was entitled to check train passengers on routes used for irregular entry pursuant to the Residence Act. As occasional checks can be performed on passengers, the court ruled that police officers may select people to be checked on the basis of their appearance.



## Executive director faces discrimination on grounds of age

The executive director of a group of hospitals alleged discrimination on grounds of age when his employment contract was not renewed on the basis that the group wanted to put someone in the position who could work towards the long-term development of the group's business. He was aged 62 at the time the facts occurred and claimed compensation of €110,000.

The Federal Civil Court (*Bundesgerichtshof für Zivilsachen*) ruled that Article 6(3) of the Equal Treatment Act (AGG) was applicable to the refusal to renew the contract and found no circumstances which could justify direct discrimination on grounds of age.<sup>94</sup> As far as compensation is concerned, the plaintiff had already been granted €36,600 by the Higher Regional Court. The Federal Civil Court disagreed with the assessment of material damages and referred the case back to the Higher Regional Court for reassessment. At the time of writing, the timeframe of the proceedings before the Higher Regional Court was unknown.

Internet source:

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2012&Sort=3&nr=59990&pos=0&anz=49>



<sup>92</sup> Decision of the Federal Labour Court (*Bundesarbeitsgericht*) of 20 March 2012, 9 AZR 529/10.

<sup>93</sup> Administrative Court (*Verwaltungsgericht*) Koblenz, 5 K 1026/11.K, 28 February 2012.

<sup>94</sup> Federal Civil Court (*Bundesgerichtshof für Zivilsachen*), 23 April 2012 - II ZR 163/10.

*Legislative developments***Ratification of the UN Convention on the Rights of Persons with Disabilities**

On 11 April 2012, the Parliament adopted Act 4074/2012 ratifying the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol. Greece is now compelled to prohibit all discrimination on grounds of disability and to guarantee equal and effective protection against discrimination on all grounds to persons with disabilities, pursuant to the Convention. Moreover, in order to promote equality and to eliminate discrimination, all appropriate steps to ensure that reasonable accommodation must be taken. Specific measures necessary to achieve the de facto equality of disabled people will not be considered as discrimination under the terms of the Convention.

*Internet source:*

[http://www.et.gr/ids-nph/pdfimageSummaryviewer.html?args=sppFfdN7IQP5\\_cc--m0e1wmmXN-VEXA9uPpzvVqEq8ga8rzSZFxgk-fbyTuXZsV-7kAYi3ORfmarw73IGH0FqJ3kxcPQvNBMTY9T3lvMHxXpA-BIQE1JCW9FiNMrQQT-Ek\\_FKIm\\_8xYozdPte0b4xhWdQntMzTkEkY0edifgoX1MC3ZOEwjT1tA..](http://www.et.gr/ids-nph/pdfimageSummaryviewer.html?args=sppFfdN7IQP5_cc--m0e1wmmXN-VEXA9uPpzvVqEq8ga8rzSZFxgk-fbyTuXZsV-7kAYi3ORfmarw73IGH0FqJ3kxcPQvNBMTY9T3lvMHxXpA-BIQE1JCW9FiNMrQQT-Ek_FKIm_8xYozdPte0b4xhWdQntMzTkEkY0edifgoX1MC3ZOEwjT1tA..)

*Policy development***Ombudsman issues an information pamphlet informing vulnerable groups and potential victims about discrimination**

In January 2012, the Greek Ombudsman issued a pamphlet providing information to vulnerable social groups and possible victims of discrimination on the Act on the Implementation of the Principle of Equal Treatment regardless of Racial or Ethnic Origin, Religion or Other Beliefs, Disability, Age or Sexual Orientation.<sup>95</sup> The pamphlet also provides information on the Ombudsman's competence to receive complaints on all grounds of discrimination in the public sector. The pamphlet also highlights the Ombudsman's role of mediator between the public administration and individuals to help victims of discrimination to effectively enforce their rights. Details of how victims can contact the Ombudsman, how they can file a complaint and how the equality body promotes equal treatment and combats discrimination are presented. The pamphlet has been inserted into 75,000 copies of a free newspaper and distributed all over the country. An electronic version is also available online.

*Internet source:*

<http://new.synigoros.gr/?i=metaxeirisi.el.news.57823>

*Case law***Council of State declares provisions on age regarding access to the profession of bailiff unconstitutional**

A woman was denied access to the profession of bailiff on the basis that she had turned 35 years old. She lodged a claim to court but a period of nine years elapsed before a final decision was rendered in 2012. The Council of State (supreme administrative court) eventually declared unconstitutional the provisions establishing age limits to access the profession of bailiff, if they are not justified by reasons of necessity. In particular, the Court invalidated Article 6 of Act 2318/1995 providing that only candidates aged less than 35 were allowed to sit exams to become bailiffs. The court stated that these age limits were not propor-

<sup>95</sup> Act 3304/2005 of 27 January 2005.

tionate with regard to the purpose of the law, which was to guarantee adequate scientific knowledge, experience and moral integrity. The fact that someone has turned 35 cannot automatically mean a reduction of intellectual capacity precluding exercise of the profession. The court therefore concluded that the age limits in question violated the principles of proportionality, professional freedom and participation in economic and social life enshrined in Articles 5 and 25 of the Constitution.

*Internet source:*

<http://www.imerisia.gr/article.asp?catid=12333&subid=2&pubid=112861415>

## Hungary

HU

### *Legislative development*

#### **Amendments to the Equal Treatment Act regarding the Equal Treatment Advisory Board and the status of the President of the Equal Treatment Authority**

Act CLXXIV of 2011 has radically amended the Equal Treatment Act.<sup>96</sup> As of 1 February 2012, the Equal Treatment Advisory Board, an advisory body consisting of six members with extensive experience of human rights and enforcement of the principle of equal treatment, has been abolished. The Advisory Board also assisted the Equal Treatment Authority in dealing with legal opinions. The Board's mandate expired in May 2011 and no new members had been appointed by the Prime Minister.

The Act also amended the status of the President of the Authority. Under the new rules, the President of the Republic appoints the President for nine years upon the recommendation of the Prime Minister.<sup>97</sup> The President of the Authority can be only dismissed under very specific conditions.

#### **Equality body's budget facing severe cut**

Annex 1 of Act CLXXXVIII of 2011 on Hungary's central government budget for 2012 set the budget for the Equal Treatment Authority. The amount allowed for staff costs was slashed to 37% of the previous year's total, and running costs were decreased by 76%. As a result, the total number of staff has been reduced from 31 to 22, but it would appear that the budget covers only 17 members.

*Internet source:*

[http://jogszabalykereso.mhk.hu/cgi\\_bin/njt\\_doc.cgi?docid=143414.584793](http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=143414.584793)

### *Case law*

#### **Supreme Court quashes Equal Treatment Authority's finding that a mayor was guilty of hate speech<sup>98</sup>**

At a meeting of the local council of Edelény, the town's Mayor declared that 'in the neighbouring settlements, in settlements with a Gypsy majority, for instance in Lak or in Szendrőlád, pregnant women take medication in order to give birth to demented children so that they will be entitled to increased family allowances. Pregnant women [...] repeatedly hit their bellies with rubber hammers so as to give birth to disabled children'.

racial  
or ethnic  
origin

<sup>96</sup> Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA), Articles 17/B–17/E, and 35.

<sup>97</sup> Previously the President was appointed by the Prime Minister for an indefinite term and could be removed at any time without further justification (which happened to the first President of the Authority).

<sup>98</sup> See *European Anti-discrimination Law Review* (EADLR), issue 10, p. 56.



In its Decision no. 1475/2009, the Equal Treatment Authority ruled that the Mayor's statement was potentially capable of creating a hostile, degrading, humiliating and offensive environment for pregnant Roma women and their neighbourhood and of exerting a negative impact on the identity, personality and future lives of these women, by contributing to their poor reputation and increasing prejudice against them. The Authority hence ruled that the Mayor's statement was harassment under Article 10 of the Equal Treatment Act and ordered the publication of its decision on its website for 90 days. On appeal, the Metropolitan Court upheld the Authority's decision and the Mayor filed an application for review by the Supreme Court.

The Supreme Court quashed the decision by the Authority and the Metropolitan Court on 16 March 2011.<sup>99</sup> By relying to Article 4 of the Equal Treatment Act, the Court stated that mayors must comply with anti-discrimination law in their capacity as elected representatives and in legally regulated social relations with residents of the municipalities that they are in charge of, including when they carry out procedures and take measures relating to these residents. Since the statements were made in relation to Roma women living in two settlements outside Edelény, the case did not fall under the scope of the Equal Treatment Act and the Mayor could not be convicted for his statements.

### **Supreme Court and Equal Treatment Authority uphold previous decisions on harassment regarding anti-Roma statements made by the Mayor of Kiskunlacháza**

In 2009, the Mayor of Kiskunlacháza (central Hungary) spoke at a public demonstration held after the murder of a young girl about the population having had enough of 'Roma aggression' and made other statements giving the impression that he believed the murder to have been committed by Roma.



On 19 October 2009, the Hungarian Helsinki Committee filed an *actio popularis* claim to the Equal Treatment Authority concerning the Mayor's statements, alleging that by making statements capable of stirring up negative sentiment against the Roma community and creating a hostile environment for its members, he had committed harassment. In its decision dated 19 January 2010, the Equal Treatment Authority established that harassment had been committed.<sup>100</sup> The Mayor filed an application for the decision to be reviewed. The Metropolitan Court quashed the Authority's decision and ordered a new hearing on 4 October 2010, arguing that the Mayor's statements were not made in any official capacity. Relying to Article 4 of the Equal Treatment Act, the Court stated that mayors must comply with anti-discrimination law in their capacity as elected representatives and in legally regulated social relations with residents of the municipalities that they are in charge of, including when they carry out procedures and take measures relating to those residents. Statements made during in a demonstration or in newspapers do not fall within the scope of the Equal Treatment Act.

On appeal, the Supreme Court found that the Mayor had unquestionably made the statements in his official capacity,<sup>101</sup> and referred the case back to the Equal Treatment Authority to determine whether the public statements fell within the scope of any of the Mayor's statutory tasks or competences defined by law or whether they can be regarded as acts that do not fall within the Mayor's statutory remit but create 'legally regulated social relations' between members of the group concerned and the Mayor. In addition, the Supreme Court instructed the Authority to examine whether harassment can be committed against a group since the legal definition of harassment mentions 'person' with no reference to a 'group'.

In the new proceedings, the Authority pointed out that under Article 8 of the Local Councils Act, local councils are responsible for ensuring the rights of national and ethnic minorities, including their right to

<sup>99</sup> Supreme Court Decision no. Kfv.II.37.551/2010/5 of 16 November 2011.

<sup>100</sup> Equal Treatment Authority Decision EBH no. 187/2010.

<sup>101</sup> Supreme Court decision no. Kfv.III.39.302/2010/8 of 18 October 2011.

live peacefully in settlements.<sup>102</sup> The Authority then referred to Decision 961/B/1993 of the Constitutional Court, which ruled that mayors fulfil a representative role as part of their obligations under public law. Consequently, when a mayor speaks at a public demonstration he exercises statutory functions falling within the scope of the Equal Treatment Act. In addition, the Authority stated that not only direct and indirect discrimination may be committed against groups but also harassment within the meaning of the Equal Treatment Act. The Authority based its findings on the reasons contained in the Preamble to the Equal Treatment Act and on the fact that *actio popularis* claims (which necessarily concern groups) are not excluded with regard to harassment.

The Authority concluded that since the Equal Treatment Act applies to statements made by mayors, harassment can be committed against groups and the Mayor's statements were definitely capable of creating a humiliating and threatening environment for the local Roma community, harassment had occurred. At the time of writing, we did not know whether the Mayor will appeal the decision but it is very likely that the case will reach the Supreme Court again.

### **Practice of racial profiling against the Roma community acknowledged by the police force**



The notary of the village of Rimóc (northern Hungary) noticed that fines for the absence of mandatory accessories on bicycles (such as headlights, bells and reflectors) were almost exclusively imposed on Roma, whereas bicycles used by non-Roma were not significantly better equipped. He notified the Equal Treatment Authority and the Hungarian Helsinki Committee. The Authority initiated an ex officio investigation and the Hungarian Helsinki Committee intervened during proceedings in its capacity as an organisation with the right to bring *actio popularis* claims. By referring to statistics on fines, the Hungarian Helsinki Committee substantiated that individuals deemed to be of Roma origin were ordered to pay a fine in 35 cases out of 36, whereas the Roma population amounted to approximately 25 per cent of the village. The Committee conducted a field trip, took pictures and used internet advertisements for second hand bicycles to demonstrate that most bikes did not meet the requirements, and therefore it was unlikely that only Roma had committed this petty offence.

The case ended in a friendly settlement between the Hungarian Helsinki Committee and the County Policy Chief of Nógrád on 26 April 2012. The Police Chief acknowledged that the practice may have disproportionately affected the Roma community but stressed that it was impossible to measure this specifically since the police are not allowed to process data on the ethnic affiliation of individuals subject to fines. The police agreed to deliver a three-day training seminar on anti-discrimination to 20 police officers. It also offered to provide the necessary bike accessories to the local community free of charge. Finally, the police will ensure that the data necessary to verify whether the practice has been discontinued are communicated to the Hungarian Helsinki Committee for the next two years.

*Internet source:*

<http://www.egyenlobanasmod.hu/jogesetek/hu/190-2012.pdf>

<sup>102</sup> Equal Treatment Authority Decision EBH/21/2012 of 20 April 2012.



*Legislative developments***Proposal to merge the Irish Human Rights Commission and the Equality Authority**

The Minister for Justice, Equality and Defence has issued a bill to replace the Equality Authority and the Human Rights Commission with a new Irish Human Rights and Equality Commission. The Government agreed in principle in October 2011 and the Minister for Justice and Equality subsequently set up a Working Group to advise him on practical issues, including on powers and functions and other issues for the legislation. The Group reported on 19 April 2012 and the Minister announced that the government has been able to accept all their recommendations relating to the legislation that is needed to give effect to the merger. The bill provides for:

- an independent selection process to nominate people for appointment to the new Commission, and appointment by the President following passing of a resolution by both Houses of the Oireachtas;
- strengthened powers and functions for the new Commission, including an effective power of inquiry; and
- an express duty on public bodies to have due regard to human rights and equality. This specific provision has been drafted on the basis of obliging a public body to formally consider human rights and equality issues relevant to its work, to set out its consideration of relevant issues in its Strategic Plan and to report on relevant issues and events in its annual report.

*Internet source:*

<http://www.inis.gov.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf>

*Legislative developments***Procedural amendments for discrimination cases adopted**

The 2003 decrees transposing the Anti-discrimination Directives and subsequent national law provided a special procedural regime for discrimination cases.

This procedure was abolished on 2 September 2011 and rules under the Code of Civil Procedure now apply to discrimination cases at first instance. Under these provisions, a simplified procedure is still followed for discrimination cases but is not as informal as in the past. The judge issues an order but an application for review may be filed with a court of appeal, as it can in ordinary cases. If an order is not appealed, it has the same binding force as a final judgment. The new procedural regime entered into force on 6 October 2011.

*Internet source:*

<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011;150>

## Case law

### Employee asked to take off her veil in a courtroom



A judge of the Court of Turin asked an interpreter to take off her veil as Article 471 of the Civil Procedural Code and Article 129 of the Criminal Procedural Code require that those present at hearings are bare-headed. She refused and quit her job. Later, the court president on his own initiative referred the case to the Superior Council of the Judiciary (*Consiglio superiore della Magistratura*), asking for an opinion.

The Council held that judges must organise and manage hearings with respect for freedom of religion, as guaranteed by Article 19 of the Constitution. This right could only be limited when the smooth progress of hearings was under threat. However, further to the opinion the interpreter has not been reinstated in her position and no compensation has been awarded.

*Internet source:*

[http://www.csm.it/circolari/120222b\\_6.pdf](http://www.csm.it/circolari/120222b_6.pdf)

MT

## Malta

### Legislative developments

#### UN Convention on the Rights of Persons with Disabilities incorporated into national law



Act no. 2 of 2012 introduced a number of amendments to existing laws combating discrimination on the grounds of disability to implement the UN Convention on the Rights of Persons with Disabilities. Harassment on grounds of disability is criminalised and fines of up to €2,500 or a prison sentence of up to six months are provided against perpetrators. 'Harassment' is broadly defined as subjecting anyone to any unwelcome act, reasonably regarded as offensive and/or degrading.

The powers of the National Commission for Persons with Disability have been extended to allow any appropriate administrative and/or judicial measure to eliminate discrimination. The Commission is also vested with awareness-raising, promotion and monitoring of the UN Convention and its Optional Protocols as ratified by Malta. Any person with a legitimate interest, including associations, may initiate a legal action against perpetrators of discrimination before the First Hall of the Civil Court. In addition to an action, a claim for compensation with a maximum amount of €2,500 for non-material damages may be filed. The burden of proof shifts to the defendant.

## Legislative developments

### Bill prohibiting the wearing of clothing totally or partially covering an individual's face

After a number of attempts in the past to prohibit the wearing of the *burka*, *niqab* and any other clothing covering an individual's face in public spaces,<sup>103</sup> the government has submitted a bill to the Parliament.<sup>104</sup> Under the proposed legislation, it would constitute a criminal offence punishable with a fine of €380. The prohibition would apply to public spaces, all public buildings, educational institutions, health care institutions and public transport. Buildings and public or private spaces designated for religious services would, however, be exempted from the ban.



The prohibition would concern the wearing of clothing totally covering an individual's face, partially covering the face so that only the eyes are visible, or covering the face in such a way that it is no longer identifiable, unless such clothing is required for reasons of health or safety, to perform certain professional or sporting activities or in the context of specific events such as Saint Nicolas, Carnival, Christmas or any celebration for which the mayor would give explicit authorisation.

The Advisory Division of the Council of State (whose role is to advise the government and Parliament on legislation) has criticised the proposal as it doubted whether there were any valid compelling reasons justifying this prohibition.<sup>105</sup> The Council observed that existing public order legislation may be used to force someone to take off a garment covering his or her face. In particular, the Council regretted that the bill's reasoning was based on the pressure exercised by relatives or religious communities and unequal participation of women in society as the prohibition would further stigmatise these women. At the time of writing, it was uncertain if the bill would be adopted. In any event, it will not be discussed before a new government is formed after the elections in September 2012.

## Political developments

### Proposal to abolish use of 'allochtoon' and 'autochtoon'

Article 16 of the Personal Data Protection Act (*Wet Bescherming Persoonsgegevens*) stipulates that information regarding an individual's race, political convictions, religion or belief, health, sexual life and membership of a trade union cannot be collected or processed in any way. Article 18 states that categorisation or registration on grounds of ethnicity is permitted only for the purposes of positive action or identification.<sup>106</sup>



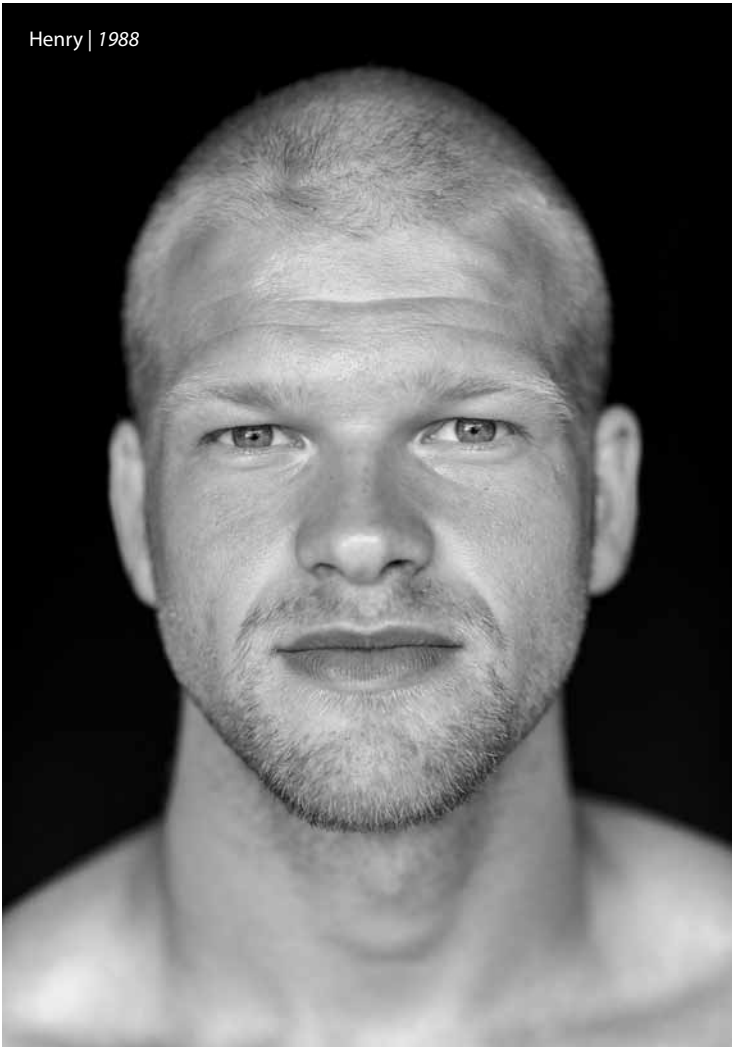
<sup>103</sup> See *Tweede Kamer* (2005-2006) 29 754 no. 41 (Motion of Geert Wilders, MP for the Freedom Party); *Tweede Kamer* (2006-2007), 31 108, no. 1-2 (bill of Wilders and Frisma, MPs for the Freedom Party); *Tweede Kamer* (2007-2008) 31 331, no. 1-2 (bill of Kamp, MP for the Liberal Party).

<sup>104</sup> Parliamentary Papers 2011-2012, 33 165 no. 1-4.

<sup>105</sup> For reasons behind the prohibition, see the bill's Memorandum of Explanation.

<sup>106</sup> Formally, it is not required that the person(s) concerned give(s) their prior consent. However, there is a duty to inform people that data are collected for that particular purpose and people should have the opportunity to object.

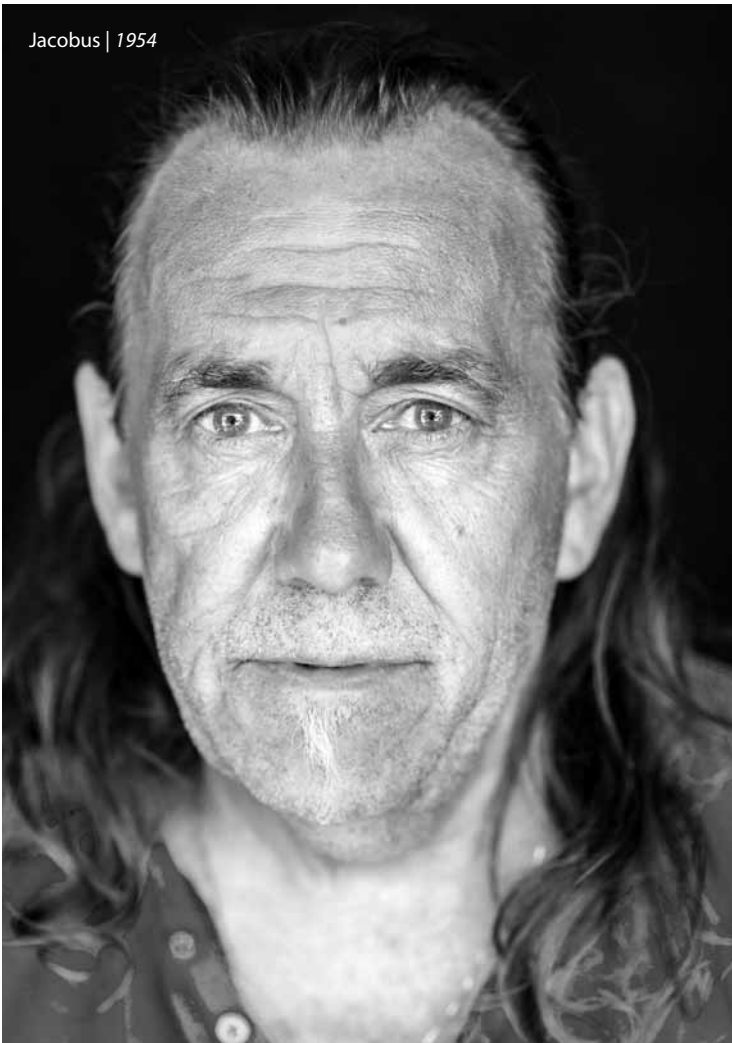
Henry | 1988



Jeannette | 1966



Jacobus | 1954



Elodie | 1989



The Council for Social Development (*Raad voor Maatschappelijke Ontwikkeling*) issued an opinion which proposed to abolish use of the words '*allochtoon*' and '*autochtoon*' to avoid stigmatisation.<sup>107</sup> Under the current practice, individuals may be classified as 'not originally Dutch' when in fact they are Dutch citizens who are fully integrated into society. According to the Council, there were no reasons to maintain the categories since the government announced in 2010 that there would no longer be positive action for ethnic minorities. By contract, the Minister for Immigration, Integration and Asylum declared that the categories will still be used in order to design appropriate integration policies.<sup>108</sup>

Internet source:

<http://www.adviesorgaan-rmo.nl/publicaties/adviezen/2012/1858/1866/>

### Case law

#### Situation testing conducted regarding admission to a bar in Rotterdam

A local anti-discrimination bureau (RADAR, Rotterdam) received several complaints about the discriminatory admission policy of a bar. RADAR used situation testing to determine whether there was discrimination on grounds of race and ethnicity. Pairs of young males were sent to the café over two different evenings. None were members or regular customers but they were dressed in a similar fashion and had a normal haircut. Situation testing demonstrated that all the pairs of Dutch origin were allowed to enter, while pairs composed of two non-Dutch males or one Dutch and one non-Dutch male were denied entry on grounds that they were not members or regular customers. The results were brought to the attention of the police and the public prosecutor. A meeting was held between all parties involved where the owner of the bar agreed to establish a transparent and non-discriminatory admission policy. A few months later, repeated situation testing showed similar discriminatory results, which led RADAR to bring the case before the Equal Treatment Commission.<sup>109</sup>



The owner argued that the admission policy intended to ensure a representation (*afspiegeling*) of customers which mirrored the overall population of Rotterdam in terms of ethnicity. To that effect, he aimed for a proportional representation of 80 per cent of Dutch and 20 per cent of non-Dutch. The Equal Treatment Commission noted that situation testing had been correctly conducted and held that this policy constituted direct discrimination on grounds of race and ethnicity. It could not be justified as positive action within the meaning of Article 2(3) of the General Equal Treatment Act since the aim was not to place in a better position individuals belonging to an underrepresented or systematically disadvantaged group. The Equal Treatment Commission also found indirect discrimination as situation testing showed that all Dutch pairs could enter the bar, whereas more than 50 per cent of non-Dutch customers were denied access. The non-admission of non-Dutch pairs implied an apparently neutral rule which disproportionately disadvantaged customers of non-Dutch origin. There was no objective justification since ensuring a proportionate ethnic representation of the population did not constitute a legitimate aim.

Decisions of the Equal Treatment Commission are not binding. At the time of writing it was unclear whether judicial proceedings would be initiated against the bar.

<sup>107</sup> In the Netherlands, both the government and researchers frequently refer to the classification of '*allochtoon*' and '*autochtoon*'. Statistics Netherlands, the national statistics office, defines an '*autochtoon*' as anyone whose parents were both born in the Netherlands (see <http://www.rijksoverheid.nl/nieuws/2012/05/08/leers-registratie-afkomst-van-allochtonen-blijft-nodig.html>) by contrast to an '*allochtoon*', which refers to anyone with one parent born outside the Netherlands. Sub-categories of '*allochtoon*' are further established depending on the place of birth of the mother or the father.

<sup>108</sup> See <http://www.rijksoverheid.nl/nieuws/2012/05/08/leers-registratie-afkomst-van-allochtonen-blijft-nodig.html> (last accessed 4 June 2012).

<sup>109</sup> Equal Treatment Commission Opinion 2012-50 of 15 March 2012.



*Internet source:*

[http://cgb.nl/oordelen/oordeel/225140/discriminatoir\\_deurbeleid\\_caf\\_c3\\_a9\\_de\\_kazerne\\_alloch-tone\\_bezoekers\\_wordt\\_onevenredig\\_vaak\\_de\\_toegang\\_geweigerd\\_](http://cgb.nl/oordelen/oordeel/225140/discriminatoir_deurbeleid_caf_c3_a9_de_kazerne_alloch-tone_bezoekers_wordt_onevenredig_vaak_de_toegang_geweigerd_)

### **Pension scheme discriminates on grounds of race**



The Netherlands has a residence-based statutory national insurance scheme (General Old Age Pensions Act - AOW). All residents who have lived in the Netherlands between the ages of 15 and 65 are eligible to receive a full state pension at the age of 65, regardless of their origin or nationality. The AOW is an accrual system: 2 per cent is accrued per annum, unless residence in the Netherlands had been disrupted in which case the rate of 2 per cent does not apply for each year spent abroad. Benefits are based on net minimum wages. A single person receives 70 per cent of the net minimum wage per month. Couples receive two times 50 per cent of the net minimum wage per month. An eligible old age pensioner who has turned 65 is entitled to a supplementary allowance if his/her spouse or partner is under 65.<sup>110</sup>

In the present case, the complainant was entitled to 50 per cent of the old age pension from the day he had turned 65. His younger wife was born in Poland and had moved to the Netherlands when she was 50. The supplementary allowance was consequently based on her effective period of residence in the Netherlands and he was granted 30 per cent of the allowance that he would have received if his wife had lived in the Netherlands for 50 years.

The complainant alleged discrimination on grounds of race and ethnic origin, prohibited in the area of social security, including the national statutory social security scheme, pursuant to Article 7 (a) of the General Equal Treatment Act. The Equal Treatment Commission considered that race, the Polish origin of his wife in this context, constituted the decisive factor for the reduction in the supplementary allowance.<sup>111</sup> The Commission recognised indirect discrimination by association as the residence criterion, although neutral in its wording, negatively affects eligible pensioners and their partners of non-Dutch origin. The structure of the AOW was designed to avoid situations where: 1) pensioners are eligible to receive old age pensions in their country of origin and in the Netherlands; 2) individuals who have not contributed to the state pension fund are fully eligible; and 3) couples receive two times 50 per cent and a reduced amount when the younger partner turns 65.

Only the second aim was found legitimate by the Equal Treatment Commission as it ensured the financial sustainability of the system. However, it concluded that the means were not proportionate as the interests of the claimant in receiving the full 50 per cent of the supplementary allowance should prevail over the interests of the state in saving money.

Decisions of the Equal Treatment Commission are not binding.<sup>112</sup>

*Internet source:*

[http://cgb.nl/oordelen/oordeel/225126/de\\_minister\\_van\\_sociale\\_zaken\\_en\\_werkgelegenheid\\_en\\_de\\_sociale\\_verzekeringsbank\\_maken\\_indirect\\_onderscheid\\_op\\_grond\\_van\\_ras\\_door\\_een\\_man\\_te\\_korten\\_op\\_zijn\\_aow\\_toeslag\\_omdat\\_](http://cgb.nl/oordelen/oordeel/225126/de_minister_van_sociale_zaken_en_werkgelegenheid_en_de_sociale_verzekeringsbank_maken_indirect_onderscheid_op_grond_van_ras_door_een_man_te_korten_op_zijn_aow_toeslag_omdat_)

<sup>110</sup> The supplementary allowance paid when a partner's income is low will be abolished in 2015.

<sup>111</sup> Equal Treatment Commission Opinion 2012-47 of 6 March 2012.

<sup>112</sup> The Supreme Administrative Court (competent in social insurance cases) previously ruled in some other cases that the 2 per cent accrual rate was based on objective reasons (e.g. CRvB 28-05-29009, LJN: BI9049). In a number of cases, the Court had dealt with the 2 per cent rule and rejected the claim that it was discriminatory. See LJN: AF7507, BG3608, AF2361, BJ2440, AW7288, AZ2594.



## Church's property letting practice considered discriminatory

The complainant asked to be put on the waiting list to rent a house owned by a Protestant church as she fulfilled all the requirements. After a year without being granted a house, she was told that Baptists were given priority even if they had signed up on the waiting list after she had.



Before the Equal Treatment Commission, the board of the Baptist church argued that the General Equal Treatment Act did not apply to the purely internal affairs of churches, religious communities or associations of a spiritual nature pursuant to Article 3 (a) of the Act, which excludes these organisations from the scope of the law. The Equal Treatment Commission interpreted the provision narrowly, stating that the exception did not concern religious organisations participating in social and economic life.<sup>113</sup> If a church therefore decides to offer goods and services, including housing, it falls under the scope of the Equal Treatment Act, like any other private party doing business.<sup>114</sup> Consequently, the Equal Treatment Commission found direct discrimination on grounds of religion.

*Internet source:*

<http://www.cgb.nl/oordelen/oordeel/225315/volledig>

## Norway

NO

### *Legislative developments*

## Government suggests ratification of the UN Convention on the Rights of Persons with Disabilities

The Ministry of Foreign Affairs has proposed the ratification of the UN Convention on the Rights of Persons with Disabilities with effect as of 1 July 2013<sup>115</sup> as the Guardianship Act will enter into force on that date.<sup>116</sup>



The Ministry of Children, Equality and Social Inclusion has suggested that the Equality and Discrimination Ombud would be responsible for monitoring implementation, in parallel with the national supervisory system for the UN Convention on Racial Discrimination and the UN Convention on the Elimination of All Forms of Discrimination against Women.<sup>117</sup>

Both proposals were enacted by the King in Council of 11 May 2012 and were passed on to the Parliament for discussion by the Committee for Labour and Social Affairs next autumn 2012.

<sup>113</sup> Equal Treatment Commission Opinion ETC 2012-84 of 4 May 2012.

<sup>114</sup> This raises issues around almshouses, which are charitable institutions providing accommodation that were set up in the Middle Ages. The founders of Dutch almshouses often stipulated in their wills that the houses could only be rented out to people of a particular religion or of one gender. These wills are still respected by the boards of many almshouses today.

<sup>115</sup> Preparatory works Prop. 106 S (2011–2012), Proposition to the *Stortinget* (proposal for Parliamentary resolution) on consent to the ratification of the UN Convention of 13 December 2006 on the Rights of Persons with Disabilities.

<sup>116</sup> The Guardianship Act contains rules on when a person is considered to be responsible for his or her own legal acts and defines the circumstances in which a person's legal capacity can be restricted to that of a minor.

<sup>117</sup> Preparatory works, Prop 105 L 2011–2012 on changes to the Anti-Discrimination Ombud Act on the supervision of implementation of the UN Convention on the Rights of Persons with Disabilities.

### CJEU ruling on age discrimination applied by national court



Ten helicopter pilots challenged a collective agreement establishing mandatory retirement at the age of 60, alleging discrimination on the grounds of age within the meaning of the Working Environment Act.<sup>118</sup>

The Supreme Court suspended proceedings to wait for the CJEU's preliminary ruling in the *Prigge* case as it concerned the automatic termination of employment contracts at the age of 60 pursuant to a clause in a collective agreement.<sup>119</sup> In line with this judgment, the national judge ruled that pilots could not be compelled to end employment when they had turned 60.<sup>120</sup> The Supreme Court first referred to its earlier case law<sup>121</sup> where it ruled that the Working Environment Act must be interpreted so as to be compatible with Directive 2000/78/EC even if the Directive was not part of the EEA agreement to which Norway is a signatory. Since the facts of the present case and the *Prigge* case were similar, the Court applied the same reasoning and declared that safety or health reasons could not justify the age limit of 60 for helicopter pilots. Justifications relating to dignified retirement, rapid career development of younger pilots and protection of the pension scheme were not examined.

Internet source:

<http://websir.lovdato.no/cgi-lex/wiftfil?/avg/hrsiv/hr-2012-00325-a.html>

### Age limit for recruitment of fire-fighters found discriminatory



A 34-year-old fire-fighter employed part-time applied for a full-time permanent position in a municipal fire brigade. The advertisement stipulated that applicants without relevant practical experience should not be aged above 28. Out of 69 applications, 13 candidates were invited to an interview and two of them were aged 29 and 30. The complainant was not called for an interview and he alleged discrimination on grounds of age. The employer recognised that the announcement should have been phrased differently but it argued that the complainant's application was rejected not on grounds of age but because he did not meet the physical requirements. The complainant proved that he had passed all annual physical tests since 2004.

The Equality and Anti-discrimination Tribunal also discovered that the chief of the fire brigade sent an email to the interview panel stating that candidates aged maximum 28 were desirable for reasons of physical endurance and strength.<sup>122</sup> The Tribunal concluded that the employer did not sufficiently prove that age was not a decisive factor in the rejection. No sanctions were imposed as only ordinary courts are entitled to issue compensation orders. At the time of writing, the fire-fighter, represented by his trade union, has brought the case to court to obtain compensation.

<sup>118</sup> Chapter 13.

<sup>119</sup> C-447/09. See p. 35 of the present issue.

<sup>120</sup> Supreme Court decision HR-2012-325-A of 14 February 2012.

<sup>121</sup> See HR-2012-580-A, HR-2012-325A, Rt-2011-964, Rt-2011-609 and Rt-2010-202.

<sup>122</sup> Equality and Anti-Discrimination Tribunal Decision 35/2011 of 25 May 2012.

# Poland

PL

## Case law

### Discontinuation of employment after 65 years of age does not constitute discrimination

A prosecutor's request to the General Prosecutor to continue in employment after he had turned 65 years of age was rejected due to the 'necessity for the generational replacement of prosecution staff'. To continue employment would constitute an exception to the ordinary regime, justified by special circumstances dictated by the interests of the service or connected to the personal situation of a prosecutor. The Supreme Court held that there was no discrimination pursuant to the provisions on retirement age.<sup>123</sup>



# Portugal

PT

## Case law

### Racist and discriminatory statements on TV show

The High Commissioner for Immigration and Intercultural Dialogue (ACIDI) filed a complaint against RTP1 (the first TV channel in Portugal) to the Media Regulatory Authority (ERC- *Entidade Reguladora para a Comunicação Social*), alleging racist and discriminatory statements in the TV show *Portugal no Coração* broadcast on 22 February 2011. The ACIDI criticised a reporter who mimicked an African accent after an interview with a singer from Angola. The ERC was asked to determine whether such behaviour contravened the rules governing television broadcasting and legal provisions prohibiting discrimination on grounds of ethnic or racial origin.<sup>124</sup> The ERC recognised that such conduct could exacerbate racial stereotypes but noted that the reporter's behaviour was not inspired by and was not intended to encourage any racist feeling. It also observed that extra precautions were required from a public operator when entertaining an audience of diverse cultures and ethnic origins. It therefore urged the TV channel to broadcast its TV shows in compliance with equality and anti-discrimination legislation. The decision is binding and no sanction was imposed.



Internet source:

<http://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvltzOjM5OiJtZWRpYS9kZWNPc29lcy9vY-mplyY3RvX29mZmxpbmUvMTczNS5wZGYiO3>

# Romania

RO

## Case law

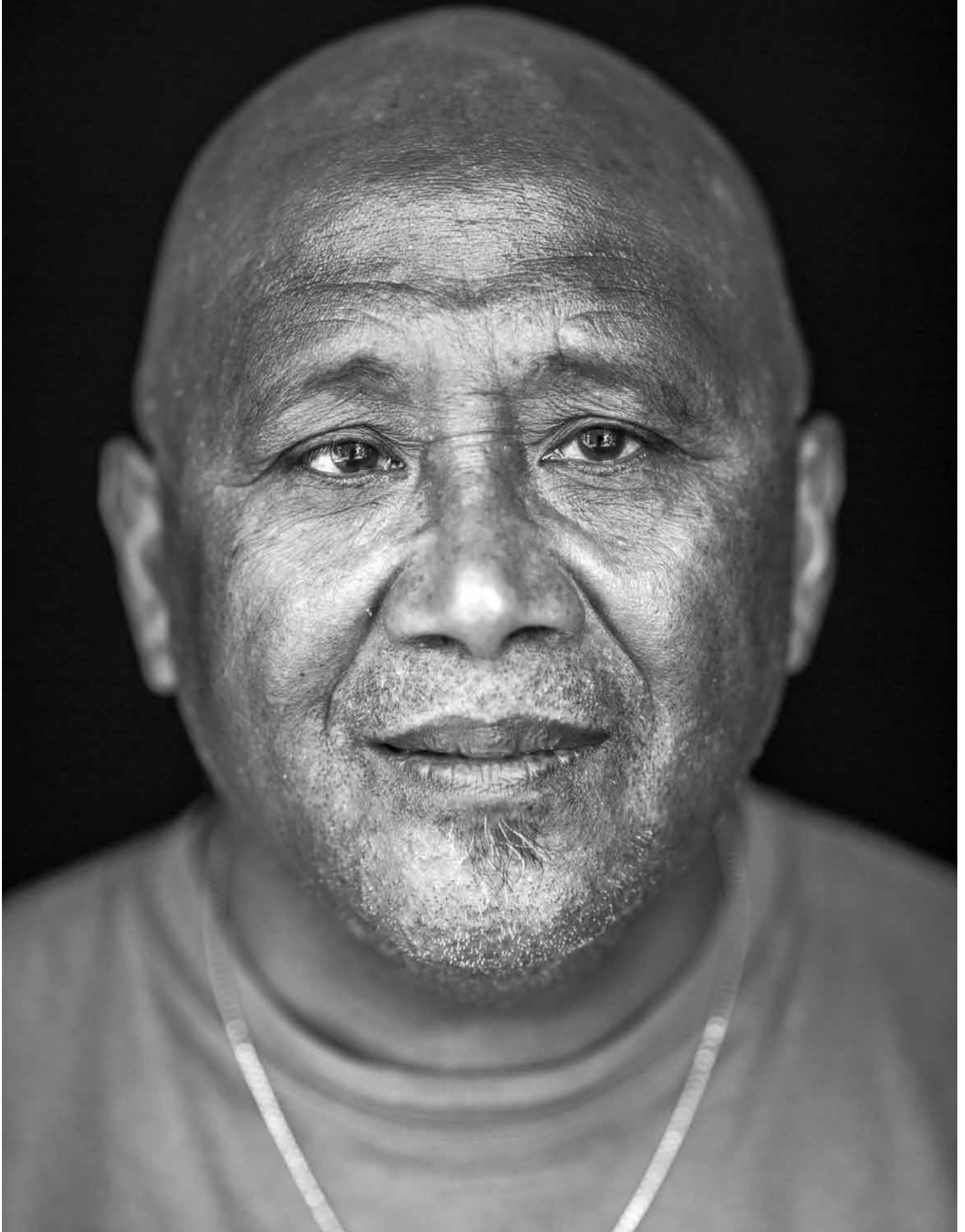
### Mayor of Baia Mare convicted for building a segregation wall

In July 2011, a wall of 1.8-2 metres high and 100 metres long was planned to be erected between a Roma neighbourhood and the main road in the city of Baia Mare (north Romania). The Mayor argued that the wall was designed to prevent traffic accidents. In spite of strong opposition by human rights groups and



<sup>123</sup> Supreme Court Decision III PO 9/10, *XY v General Prosecutor* of 3 February 2011.

<sup>124</sup> Decision 26/CONT-TV/2011 of 7 September 2011.



the national equality body and despite the wide media coverage, construction work was carried out. The National Council for Combating Discrimination (NCCD) started an investigation of its own accord and petitions were filed by the NGO *Centrul Creștin al Romilor* as well as by the Ministry of Regional Development and Tourism (*Ministerul Dezvoltării Regionale și Turismului*).

The NCCD found harassment within the meaning of Article 2(5) of the Anti-discrimination Order in conjunction with Article 15 regarding infringement of human dignity.<sup>125</sup> The construction of a wall was considered to constitute a very serious act which negatively affected the life of the entire Roma community, whereas less severe measures such as bumps to reduce the speed of traffic could adequately prevent traffic accidents. Consequently, the NCCD imposed a fine of RON 6,000 (approximately €1,500) and recommended the demolition of the wall. The Mayor appealed the decision.

The Cluj Court of Appeal ruled that the aim of ensuring public safety invoked by the Mayor was legitimate and that the means to achieve that aim were proportionate,<sup>126</sup> on the grounds that to surround a space does not in itself presume a degrading measure which can impede human dignity. In addition, the fact that there were two exits from the main road precluded ethnic segregation with the purpose of marginalising the Roma community. The Court focused on the composition of the population, not in terms of ethnicity but in terms of age, and observed that due to the fact that children made up the majority of the area's population, permanent supervision by adults was not possible and therefore the wall allowed for better control of access to the main road. The Court also relied on a note from the local police reporting five accidents.

The court did not ask the Mayor to produce any evidence of complaints from drivers and people living in the area or of other measures to ensure road safety which would have failed (such as road safety education or an appropriate pedestrian crossing). Finally, the Court observed that the inhabitants targeted had themselves never complained that they were subject to degrading or humiliating treatment or that their dignity had been infringed.<sup>127</sup> The NCCD has announced its intention to challenge the decision.

### **Unprecedented fine imposed in a disability discrimination case**

Lavinia Rausch was refused entrance to a night club. The doorman argued that she could not use her wheelchair because the venue was crowded. She was again denied access on different nights although the club was empty. Before the NCCD, the respondent invoked logistical conditions which made it difficult for people using a wheelchair to access the venue even though there was a ramp. However, with prior notice, appropriate measures could be taken to allow people with disabilities to enter and to provide adequate staff assistance. In addition, the club claimed that the plaintiff had been invited to remain on the terrace which was accessible to wheelchairs and that the doorman was not an employee of the club, but working for a security company under a subcontract.



<sup>125</sup> National Council for Combating Discrimination, Decision no. 439 of 15 November 2011 in case no. 4A/2011.

<sup>126</sup> Cluj Court of Appeal, Section II Civil, Administrative and Fiscal Law Decision no. 141/2012 of 24 February 2012 in case no. 1741/33/2011.

<sup>127</sup> This suggests that the Court was not familiar with the *locus standi* for NGOs active in combating discrimination established by Article 28 of the Romanian Anti-discrimination Order and failed to understand the specificities of discrimination cases. The Court also failed to interpret harassment correctly as unwanted conduct with the purpose or effect of creating an intimidating, hostile, degrading or humiliating environment within the meaning of Article 2 (3) of Directive 43/2000. More importantly, the Court also failed to address the NCCD's finding regarding the right to dignity under Article 15 of the Anti-discrimination Order.

The NCCD found discrimination in access to services to the public and discrimination affecting the right to human dignity on grounds of disability.<sup>128</sup> The decision also clarified the conditions in which a company may be held liable for discriminatory acts by subcontractors. Private companies are under an obligation to include clauses on equality and non-discrimination and management of discrimination cases in their internal regulations. The NCCD ordered the company owning the bar to pay a total of ROM 5,000 (€1,100), reportedly the highest fine imposed so far in such a discrimination case.

### Definitions of 'Gypsy' and 'Roma' amended in official dictionary



Further to a complaint brought by three NGOs against the Romanian Academy and its research institute that is responsible for composing the official dictionary of the Romanian language, the NCCD recommended modification of the definitions provided for the word '*Tigan*' (gypsy), on the grounds of their depreciatory and pejorative character. The NCCD ruled that the complaint did not fall under the provisions of Articles 2(1) in conjunction with Article 2(5) and 15 of Order 137/2000 (the anti-discrimination law) but noted that such definitions could be read as breaching the principle of equality.

In spite of the limited findings of the decision, the Academy, together with the NGOs, issued a new dictionary in February 2012 including new definitions for 'Gypsy' and 'Roma'. The new definitions state that 'Roma' is the term used for self-identification by members of an ethnic group originating from India and at present mostly living in southern and eastern Europe, replacing the term 'Gypsy', considered as pejorative. Definitions of 'love', 'homosexuality' and 'sodomy' were also amended, as they had been criticised for their hetero-normative approach.

SK

## Slovakia

### Legislative developments

#### Legislative changes concerning *actio popularis* claims

Amendments to the Civil Procedure Act have introduced two changes relating to judicial proceedings to uphold the principle of equal treatment.<sup>129</sup>

The first amendment extended the list of possible *actio popularis* claims.<sup>130</sup> Previously, the Slovak National Centre for Human Rights and NGOs active in the field of non-discrimination could only obtain a court order requiring an entity in breach of the principle of equal treatment to refrain from such conduct and to rectify the illegal situation wherever possible. Organisations may now directly request courts to find a breach of the principle of equal treatment. The provision also leaves open the possibility of other claims that are not explicitly mentioned.

<sup>128</sup> National Council for Combating Discrimination Decision 365 of 14 September 2011, *NCCD and L Rausch v. S.C. Elaine S.R.L.* (owner of the Heaven Club in Timișoara).

<sup>129</sup> Adopted on 19 October 2011 and entering into force on 1 January 2012.

<sup>130</sup> Section 9a of the Anti-Discrimination Act previously stipulated that if a breach of the principle of equal treatment could violate rights, interests protected by law or freedoms of a high or non-specified number of persons, or if public interest could be seriously endangered, the right to invoke the protection of the right to equal treatment is also vested in the Slovak National Centre for Human Rights or a legal entity that is 'aimed at or deals with protection against discrimination' (usually NGOs active in the field of non-discrimination).



The second change enabled NGOs and the Slovak National Centre for Human Rights to claim ‘compensation of their expenses’ for proceedings concerning the principle of equal treatment.<sup>131</sup>

Internet source:

[http://jaspi.justice.gov.sk/jaspiw1/htm\\_zak/jaspiw\\_mini\\_zak\\_vyber\\_hl1.asp?clear=N](http://jaspi.justice.gov.sk/jaspiw1/htm_zak/jaspiw_mini_zak_vyber_hl1.asp?clear=N)

## Slovenia

SI

### Legislative developments

#### Office for Equal Opportunities closed down

The Government Office for Equal Opportunities was closed down on 1 April 2012, further to the adoption of the new act amending the Public Administration Act. The staff, composed of 12 employees, including the Advocate of the Principle of Equality (the Slovene equality body), was transferred to the Ministry of Labour, Family and Social Affairs. The Office for Equal Opportunities, established in 2001, was primarily responsible for promoting equal opportunities and gender equality. It was also responsible for preparing legislative proposals for the purpose of transposing EU directives in the field of non-discrimination. This responsibility has now been transferred to the Ministry of Labour, Family and Social Affairs. The duties of the equality body continue to be performed by the Advocate of the Principle of Equality, under the authority of the Ministry of Labour, Family and Social Affairs.

Internet source:

<http://www.uem.gov.si/en/>

## Spain

ES

### Case law

#### The wearing of the *hijab* prohibited in school

A 17-year-old girl was expelled after she started wearing the *hijab* as school rules prohibited the wearing of clothing that covers an individual's face. This decision by the Community of Madrid (*Comunidad de Madrid*) was challenged in front of Court 32 of Madrid.

religion  
or belief

Court 32 of Madrid upheld the expulsion on 25 January 2012, arguing that schools were entitled to prohibit the wearing of clothing covering an individual's face on grounds of school rules which were based on the Education Institutional Act of 2006.<sup>132</sup> In addition, the Court held that the decision did not harm the girl's dignity and did not affect her religious freedom.

#### Victimisation of an employee who revealed allegations of discrimination and provided evidence not recognised in court

E.B. received a letter signed by ‘the workers of the factory shop A’ which contained allegations of gender and racial discrimination perpetrated by a production manager of the foreign-owned company Ericsson Eesti AS. E.B. showed the letter to a senior manager, who thought the letter was unfounded, defamatory

racial  
or ethnic  
origin

<sup>131</sup> Section 137 of the Civil Procedure Act.

<sup>132</sup> Decision no. 35/2012 of Court 32 of Madrid of 25 January 2012.

and provoked tensions. E.B.'s employment contract was terminated without notice on grounds of loss of trust, pursuant to Article 88(1) 5 of the Employment Contract Act. E.B. claimed that he was victimised within the meaning of Article 5 (1-1) of the Gender Equality Act and Article 3(6) of the Equal Treatment Act. Both acts guarantee protection to a person who supports someone else who has filed a discrimination complaint.

Harju County Court (court of first instance) concluded that E.B.'s actions should not have led to the extraordinary termination of his employment contract.<sup>133</sup> However, the Court did not find victimisation as the letter did not establish any concrete fact from which it could be presumed that discrimination had occurred. The Court concluded that an employee bears the burden of presenting a *prima facie* case of discrimination against an employer in order to be able to claim protection against victimisation.

### **Constitutional Court declares unconstitutional the age limit imposed on pharmacists**



Basque Parliament Act 11/1994 of 17 June 1994 on the management of pharmacies provides that authorisation to open new pharmacies can be granted to pharmacists aged over 65 only if there are no other applications to the same call for applications.

In May 2007, the Health Department of the Basque Government announced a call for the opening of a new pharmacy in Vitoria-Gasteiz. Out of the 38 applications, F.E.S. scored best but the Health Department rejected his application on the grounds that he had turned 65. F.E.S. alleged discrimination on grounds of age before the High Court of Justice of the Basque Country. A reference for a preliminary ruling was made to the Constitutional Court regarding the compatibility of the Act with Article 14 of the Spanish Constitution, which guarantees equal treatment on grounds of age.

The age limit was deemed unconstitutional as contravening Article 14 of the Spanish Constitution.<sup>134</sup> According to the Constitutional Court, the provision of Act 11/1994 was not sufficiently justified or proportionate to be valid. Justification based on a reduced capacity to perform pharmaceutical care was not admissible. Furthermore, it did not constitute positive action aiming at favouring young pharmacists starting their business.

*Internet source:*

<http://www.boe.es/boe/dias/2012/05/16/pdfs/BOE-A-2012-6488.pdf>

## SE

# Sweden

### *Legislative developments*

### **Proposal to extend the prohibition of age discrimination to new areas**



Further to a white paper exploring new legislation on age discrimination, the government referred a bill to the Legislative Council (*Lagrådet*) for an examination of its legal validity.<sup>135</sup> The bill proposes to prohibit age discrimination in the following areas as of 1 January 2013:

- Access to goods and services including housing, public meetings or events (Section 12);
- Health and medical care and social services (Section 13);

<sup>133</sup> Decision of Harju County Court of 23 December 2011, case 2-11-15080.

<sup>134</sup> Constitutional Court decision 78/2012 of 16 April 2012.

<sup>135</sup> The Legislative Council is a Swedish governmental agency composed of current and former members of the Supreme Court and Supreme Administrative Court.

- Social insurance, unemployment insurance and financial aid for studies (Section 14);
- Public employment (Section 17).

Direct discrimination on grounds of age would be possible subject to a proportionality test in all new areas except public employment. The test would require a legitimate purpose and means to achieve that aim which are appropriate and necessary. The bill contains two special exceptions for the insurance sector and car allowances, where age discrimination would be permitted without the proportionality test being applied.

Internet source:

<http://www.regeringen.se/sb/d/15542/a/192950>

*Policy developments*

### **Guidelines on the wearing of the *burka* and *niqab* in school**

In 2003, the Swedish National Education Board produced 15 pages of guidelines on the wearing of the *burka* and the *niqab*. It stressed that decisions must be taken on a case by case basis at the local level by the school since the School Act did not permit a general ban. In addition, a dialogue about common values, gender equality and democracy must be conducted prior to the adoption of a ban by the school board. This approach tried to accommodate the rights of Muslim women and the adoption of specific bans.



The School Inspectorate issued new guidelines on 11 January 2012, with the support of the Equality Ombudsman.<sup>136</sup> A general ban applicable to the entire school is no longer possible and teachers are now individually responsible for prohibiting the *burka* or the *niqab*. The new guidelines stressed that in most cases it would be possible to find alternative solutions which are appropriate and less severe,<sup>137</sup> and that the prohibition would be allowed in only a few exceptional cases. They referred to reasons of hygiene in the food industry and health care or safety reasons in laboratories as examples of exceptional circumstances in other sectors.

Internet source:

<http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2012/DO-valkomnar-Skolverkets-vagledning-om-religios-kladsel-i-skolan/>

## Turkey

TR

*Legislative developments*

### **New education law**

On 30 March 2012, the Justice and Development Party tabled an education bill with the support of the nationalist party, in the face of opposition from the Republican People's Party (the RPP, the main opposi-

<sup>136</sup> The new guidelines were introduced after the widely debated case on the *niqab* in school was brought to the attention of the Equality Ombudsman on 30 November 2011, case 2009/103. See *European Anti-discrimination Law Review* (EADLR), issue 12, p. 74.

<sup>137</sup> If, for instance, a teacher cannot read a student's facial expressions to check whether she has correctly understood a lesson, questioning the student to verify her actual understanding constitutes a less severe means than forbidding the student to wear the *burka* or the *niqab*.



tion party) and the pro-Kurdish party. The RPP unsuccessfully challenged the proposal before the Constitutional Court on the grounds that it violated the constitutional principles of secularism and equality.

The new law entered into force on 11 April 2012. Compulsory education was expanded from eight to twelve years and a mandatory course on human rights, citizenship and democracy for fourth grade was introduced. The law also reinstated the secondary stage of the *imam-hatip* vocational schools.

Mandatory religious courses were abolished further to the ruling of the European Court of Human Rights establishing that such courses violated the Convention, and they have been replaced with on-demand courses on Christianity, Islam, Judaism and the Alevi faith. The law also introduced optional courses on 'living languages and dialects' for two hours per week starting in the fifth grade.<sup>138</sup>

*Internet source:*

[http://www.tbmm.gov.tr/develop/owa/kanunlar\\_sd.durumu?kanun\\_no=6287](http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.durumu?kanun_no=6287)

### **Deadline for implementing accessibility to public spaces and transport extended**

The Turkish Parliament has extended the implementation deadline for facilitating access to public spaces as well as public and private transport by people with disabilities to 2015. The Persons with Disabilities Law (no. 5378) adopted in 2005 required all public buildings, public infrastructure and public places as well as public and private transportation vehicles operated by municipalities to be made physically accessible by July 2012. Close to the deadline, two MPs from the Justice and Development Party presented a proposal for an extension to 7 July 2015, saying that measures needed to be adopted to ensure the effective implementation of the law. The bill was introduced on and expeditiously adopted on 4 July. At the time of writing the text still required the President's approval.



The Minister for Family and Social Policy stated the government would establish a council composed of academics and civil society representatives to identify measures to be adopted within one year in every city and district in order to provide disabled people with access to public spaces and services. She committed the government to monitoring the process and sanctioning failures to comply with the law.

*Internet source:*

[http://www.tbmm.gov.tr/develop/owa/kanunlar\\_sd.durumu?kanun\\_no=6353](http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.durumu?kanun_no=6353)

## United Kingdom

UK

### *Case law*

#### **Large award in racial discrimination claim**

One of the largest awards in a race discrimination claim was recently made by an employment tribunal to Elliot Browne aged 55, who was unfairly dismissed from his position as a director at Central Manchester University NHS Foundation. Mr Browne, who had worked for the National Health Service for 34 years, had been subjected to race discrimination over a period of years. The pay-out of almost £1 million (€1,110,186) reflected the fact that the discriminatory treatment and his eventual dismissal resulted in serious damage to his health. The large majority of the payment related to future loss of earnings and pension. Despite evidence that Black employees constitute 2 per cent of the Trust's workforce and 25 per cent of those



<sup>138</sup> Namely Kurdish and other minority languages to be identified by the government.

dismissed for disciplinary reasons, the Trust denied that Mr Browne had been discriminated against and announced its intention to appeal.

*Internet source:*

<http://thejusticegap.com/2012/01/after-lawrence-we-should-be-ashamed/>

### **Refusal to rent a room to a same-sex couple amounts to discrimination on grounds of sexual orientation**



The Court of Appeal recently upheld the decision of a lower court that the refusal of the defendants, who ran a seven bedroom private hotel, to provide the claimants (a same-sex couple) with a double room for occupation, amounted to sexual orientation discrimination.<sup>139</sup>

The defendants argued that, as Christians, they only let double bedded rooms to married couples, because to do otherwise would be to promote sinful sexual behaviour. They also argued that to find them in breach of the relevant legislation would breach their rights to manifest their religious beliefs under Article 9 of the European Convention on Human Rights. The Court of Appeal accepted, however, that, because same-sex couples could not get married in the UK, the restriction of hotel rooms to married couples amounted to direct discrimination on grounds of sexual orientation and was therefore unlawful under the Equality Act (Sexual Orientation) Regulations 2007 (since replaced by the materially similar Equality Act 2010).

*Internet source:*

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/83.html>

### **Age discrimination in business partnerships recognised by Supreme Court**



The claimant was a partner in a law firm who was required to retire when he reached 65 in line with the partnership's policy of mandatory retirement at that age. The retirement age was not covered by the default retirement age then in place in the UK (also 65) because, as a partner, Mr Seldon was not considered as an 'employee'.

The Supreme Court ruled that mandatory retirement could be justified by the aims of (1) ensuring that associates could progress to partnership after a reasonable period; (2) facilitating long-term workplace planning and (3) 'limiting the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture.'<sup>140</sup> The Court ruled that direct age discrimination alone could be justified under Directive 2000/78 because 'age is different... not "binary" in nature (man or woman, black or white, gay or straight) but a continuum which changes over time... younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age'. The Court further ruled that the tests for justification of direct and indirect age discrimination differed, the legitimate aims in the case of the former being limited to social policy objectives of a public interest nature. The jurisprudence of the CJEU, which the Court reviewed, suggested that two broad types of legitimate aim could be pursued by direct age discrimination: 'inter-generational fairness' and 'dignity'. The aims pursued by the defendant in the instant case were legitimate but the question of proportionality – specifically, whether the ends pursued justified the selection of a retirement age at 65, as distinct from any other age, would be referred back to the Employment Tribunal.

*Internet source:*

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)

<sup>139</sup> Court Judgment [2012] EWCA Civ 83 of 10 February 2012.

<sup>140</sup> *Seldon v Clarkson Wright and Jakes*, Supreme Court [2012] UKSC 16.



## Supreme Court finds age discrimination in promotion in employment

The Supreme Court recently considered a challenge to a requirement that, in order to achieve promotion beyond a certain grade, candidates had to be in possession of a law degree or equivalent, allegedly indirectly discriminating against older workers.<sup>141</sup> The claimant was 62 at the point at which he was disadvantaged by the rule, a mandatory retirement age of 65 (extendable by one year at the discretion of the employer) then operating within the defendant organisation. He argued that, completion of any law degree taking him beyond his retirement date, he was the victim of unjustified age discrimination against those aged 60-65.



A tribunal upheld his claim but the Employment Appeal Tribunal and the Court of Appeal ruled that the employer had not applied any provision, criterion or practice which disparately impacted on him as an older worker: any disadvantage the claimant experienced resulted from his proximity to leaving the defendant's employment (albeit because of the defendant's mandatory age-related termination policy), rather than from the defendant's rule about qualifications. The Supreme Court allowed the claimant's appeal, ruling that: 'The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic. A requirement which works to the comparative disadvantage of a person approaching compulsory retirement age is indirectly discriminatory on grounds of age'. The question of justification was referred back for the Tribunal to reconsider.

Internet source:

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)

## Correct reading of Article 14 of the European Convention on Human Rights with regard to disability discrimination

The claimants were parents of children with disabilities who, for reasons connected with their condition, were not able to share bedrooms with same-sex siblings as would be commonplace for children of their ages. The parents were in receipt of housing benefit which was limited by reference to the average cost of housing in accommodation with specified numbers of bedrooms, it being assumed that same-sex children would share. The result of this was that the claimants were paid considerably less housing benefit than they had to pay in rent, part of the gap being caused by their need for additional bedrooms to accommodate their children's needs.



The claimants challenged the regulations governing the calculation of housing benefit, claiming that the failure to make more generous provision for them amounted to a breach of Article 14 read with Article 8 ECHR. Birmingham City Council argued that they were no differently treated than would have been a non-disabled person who needed an overnight carer during an unexpected but finite period of ill-health, relying on a decision reached under the Disability Discrimination Act 1995 (since replaced by the Equality Act 2010). The parents relied specifically on the decision of the European Court in *Thlimmenos v Greece* (2001) 31 EHRR 15 in which that court ruled as follows:

§44 The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective

<sup>141</sup> *Homer v Chief Constable of West Yorkshire Police*, Supreme Court [2012] UKSC 15.

and reasonable justification fail to treat differently persons whose situations are significantly different.

The Court of Appeal found in favour of the claimants, stating (§13) that ‘one of the attractions of Article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law.’<sup>142</sup> The Court rejected the argument put for the Council that the *Thlimmenos* principle should not be applied so as to require a state to take positive steps to allocate a greater share of public resources to a particular person or group. Further, the Court accepted that Article 14 ought to be read in light of the UN Convention on the Rights of Persons with Disabilities, citing the decisions of the ECtHR in *Demir and Baykara v Turkey* (2009) 48 EHRR 54 and in *Opuz v Turkey* (2010) 50 EHRR 28 in which the Grand Chamber read Article 11 in light of International Labour Organisation Conventions and the European Social Charter and the Chamber read Article 14 in line with CEDAW jurisprudence.

The Court of Appeal considered the correct approach to disability-related discrimination challenged under Article 14 ECHR, given effect to in the United Kingdom by the Human Rights Act 1998. The case did not fall within the material scope of Council Directive 2000/78 but is of interest because of the general nature of the findings on the correct approach to disability discrimination.

*Internet source:*

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/629.html>

<sup>142</sup> *Burnip v Birmingham City Council*, Court of Appeal [2012] EWCA Civ 629.



